

THE PROGRESSIVE LOGIC OF CRIMINAL RESPONSIBILITY AND THE CIRCUMSTANCES OF THE MOST DEPRIVED

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I. INTRODUCTION

At the dawn of the modern era of jurisprudence, Giovanni Pico della Mirandola argued that unlike the beasts and the angels, humans are able to become whatever they wish.¹ Legal systems tend to concur, particularly with respect to issues of moral responsibility for criminal acts. Apart from narrow standard categories of exceptions,² the American legal system assumes that defendants bear moral responsibility for their intentional criminal acts. Indeed, it is said that our Constitution "forbids punishment that is wholly disproportionate to the blameworthiness of the offender."³ There is remarkable agreement that in general, the legal system must not impose punishment unless the defendant is blameworthy or

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1. GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 2-3 (A. Robert Caponigri trans., 1948). For the underpinnings of such a view, see AUGUSTINE, ON FREE CHOICE OF THE WILL (Anna S. Benjamin & L.H. Hackstaff trans., 1964).

2. See, e.g., *United States v. Bailey*, 444 U.S. 394, 409-11 (1980) (duress and necessity); *United States v. Scott*, 437 U.S. 82, 97-98 (1978) (insanity and entrapment); *Hamling v. United States*, 418 U.S. 87, 119-24 (1974) (mistake of law); *People v. Raszler*, 169 Cal. App. 3d 1160, 1162 (1985) (necessity and ignorance or mistake of fact); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 302-483 (2d ed. 1986) (insanity and other legal defenses); Donald M. Zupanec, Annotation, *Coercion, Compulsion, or Duress as Defense to Charge of Robbery, Larceny, or Related Crime*, 1 A.L.R.4TH 481 (1980) (coercion, compulsion, and duress in theft prosecutions). A subtle analysis of the mistake defenses is undertaken in Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles*, 12 LAW & PHIL. 33 (1993). Despite the arguable literal relevance of these legal excuses to the circumstances of some of the most deprived persons, courts have consistently avoided applying the standard excuse categories to such circumstances. See *infra* part IV.

3. *Stanford v. Kentucky*, 492 U.S. 361, 393 (1989) (Brennan, J., dissenting). Remarkably, and implausibly, other courts have concluded elsewhere that defining criminal responsibility is a legislative matter not raising any question of state or federal constitutional law. See, e.g., *Castro v. People*, 346 P.2d 1020, 1028-29 (Colo. 1959) (en banc). It is diffi-

bears moral responsibility for her act.⁴ These considerations, however, lead our judicial system to frequent self-contradictory behavior, typically at the expense of the most deprived members of society.

cult to believe that even the broadest possible legislative definition of criminal responsibility could not raise any issue of due process of law.

4. See, e.g., H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 181 (1968) [hereinafter HART, *PUNISHMENT AND RESPONSIBILITY*] ("[A] primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him."); Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 *LAW & PHIL.* 5, 8 (1982) (stating that "blameworthiness (or blame) is a necessary condition for justifiable punishment"); Brynmor Browne, *A Solution to the Problem of Moral Luck*, 42 *PHIL. Q.* 345, 354 (1992) ("We condemn the man as well as punish him for what he does, particularly in the case of serious crime."); Joseph D. Grano, *Ascertaining the Truth*, 77 *CORNELL L. REV.* 1061, 1063 (1992) (stating that "the substantive criminal law is premised on a foundation of individual free will and responsibility"); Vinit Haksar, *Excuses and Voluntary Conduct*, 96 *ETHICS* 317, 317 (1986) (referring to the view that "normally punishment expresses condemnation of the offender"); Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 *LAW & CONTEMP. PROBS.*, Summer 1986, at 109, 111-12 (discussing the criminal judicial need for free will and "strong conceptions of individual responsibility"); Barbara B. Levenbrook, *Responsibility and the Normative Order Assumption*, 49 *LAW & CONTEMP. PROBS.*, Summer 1986, at 81, 81 (agreeing with Professor Lloyd Weinreb that "no one deserves punishment for bringing about some consequence unless he is morally responsible for that consequence"); Michael S. Moore, *Choice, Character, and Excuse*, *SOCIAL PHIL. & POL'Y*, Spring 1990, at 29, 30 ("[W]here there is a moral excuse there not only ought to be, but often is, a legal excuse as well."); C.W.K. Mundle, *Punishment and Desert*, in *THEORIES OF PUNISHMENT* 58 (Stanley E. Grupp ed., 1971); Bruce N. Waller, *Responsibility and the Self-made Self*, *ANALYSIS*, Jan. 1993, at 45, 46 (asserting that "I can be justly blamed and justly punished (or justly praised and justly rewarded) only when I am morally responsible"); David Wiggins, *Towards a Reasonable Libertarianism*, in *ESSAYS ON FREEDOM OF ACTION* 31, 55 (Ted Honderich ed., 1973) (stating that "all sorts of things in our social, judicial and penal institutions . . . may be based (and are based I think) upon the supposition that men *can* do otherwise than they do"); George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 *YALE L.J.* 1661, 1663 (1987) (stating that "our criminal law is such that people are generally held criminally responsible only when they would also be held morally responsible").

It is useful to recognize that none of this need imply the necessary illogic or injustice of "strict liability" crimes. Presumably, an actor is given a fair chance to arrange her circumstances so as to avoid any call for performing the knowing, intentional acts forming the predicate for the strict liability crime in question. Thus we can fairly criminalize the sale of tainted jams, even without showing the defendant's negligence with regard to the taint, if the defendant had sufficient opportunity to avoid selling any jams at all. See Edward Sankowski, *Two Forms of Moral Responsibility*, *PHIL. TOPICS*, Spring 1990, at 123. But see H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 67 (2d ed. 1985) (arguing that "causing harm of a legally recognized sort or being connected with such harm in any of the ways that justify moral blame, though vitally important and perhaps basic in a legal system, is not and should not be either always necessary or always sufficient for legal responsibility").

Certainly, the idea of responsibility is used in many ways.⁵ For example, the law relies upon a sense of moral responsibility⁶ that is linked to moral blameworthiness.⁷ While we generally wish, of course, to avoid personal eligibility for legal punishment, our capacity for bearing moral responsibility, for both good and bad acts, is often thought to be of enormous moral value. Immanuel Kant is well known for his linkage of the capacity for rational decisionmaking and dignity or moral value.⁸ Whether all of us, all the time, would measure up to Kant's standards as bearers of objective moral value is not entirely clear.⁹ Moreover,

5. See JOEL FEINBERG, *DOING & DESERVING* 137 (1970); HART, *PUNISHMENT AND RESPONSIBILITY*, *supra* note 4, at 211; Martin P. Golding, *Foreword: Issues in Responsibility*, *LAW & CONTEMP. PROBS.*, Summer 1986, at 1, 1.

6. See *supra* note 4. It is clear, though not crucial for our purposes, that persons may be responsible not just for their acts, but also for the consequences or effects of those acts. See Kristján Kristjánsson, *Social Freedom and the Test of Moral Responsibility*, 103 *ETHICS* 104, 113 n.21 (1992). Similarly, both the law and at least some moral philosophers seem to recognize "degrees" of responsibility. See, e.g., HART, *PUNISHMENT AND RESPONSIBILITY*, *supra* note 4, at 186-209. While it is useful to think of degrees of moral responsibility, for purposes of this Article it is not a crucial complication. We may simply say that the law generally requires that the defendant bear a sufficient degree of responsibility, above some baseline level, before legal punishment for a particular crime becomes appropriate. Thus, it is possible that the legal system may rightly levy upon two defendants the same criminal sentence even though one defendant was slightly less morally responsible than the other. However, even the less morally responsible defendant must have been responsible to some minimum baseline degree, in order for the punishment in question, or any legal punishment at all, to have been proper. In this sense, moral responsibility can be said to be an "all or nothing" matter, even though there is an important role, for example, for pleas of diminished capacity. Similarly, common sense suggests that among any large group of persons, including those referred to below as the "most deprived," some individuals will bear varying degrees of moral responsibility for what they do, and are often neither completely autonomous nor completely helpless.

7. See EDGAR BODENHEIMER, *PHILOSOPHY OF RESPONSIBILITY* 9 (1980) (linking responsibility to accountability, choice, ability to do otherwise, fault, and blameworthiness); FEINBERG, *supra* note 5, at 188 (linking responsibility, fault, and blame); HART, *PUNISHMENT AND RESPONSIBILITY*, *supra* note 4, at 186-209; Robert Audi, *Moral Responsibility, Freedom, and Compulsion*, *AM. PHIL. Q.*, Jan. 1974, at 1, 2 (stating that "to say that *x* is morally responsible for doing *A* is to say that he is *prima facie* liable to moral blame for doing it").

8. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 47 (Lewis White Beck trans., 1959).

9. For a sampling of relevant commentary, see HENRY E. ALLISON, *KANT'S THEORY OF FREEDOM* (1990); BRUCE AUNE, *KANT'S THEORY OF MORALS* 76, 82 (1979) (suggesting that the Kantian moral law is informed by respect for rational nature, which is absolute, and not merely relative, in its value); BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 62, 184 (1993) (referring to Kant's "deep silence on the question of the moral status of children" and noting that for Kant, "[p]ersons have moral standing in view of their rationality"); THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* 40-41, 47 (1992) (discussing humanity as including freedom in the form of capacities "to foresee future consequences, adopt long-range goals, resist immediate temptation, and even to commit oneself to ends for which one has no sensuous desire," and

whether any of us is ever really capable of exercising genuinely free, responsible, autonomous choice is a familiar philosophical question, lately complicated by debates over the possible relevance of quantum theory to free choice.¹⁰

dignity as pertaining to "rational nature" or to "every rational being"); LESLIE A. MULHOLLAND, *KANT'S SYSTEM OF RIGHTS* 109, 110 (1990) (asserting that every rational being acts as an end in itself, and viewing autonomy as the ground of dignity of such natures); ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 138-40 (1989) ("Things, unlike persons, are neither free nor rational; they lack the capacities required for agency."). See also, regarding the work of Henry Allison on Kant, Karl Ameriks, *Book Review*, 102 *ETHICS* 655 (1992); Paul Guyer, *Book Review*, 89 *J. PHIL.* 99, 110 (1992) ("Kant just assumes that moral . . . blame . . . would be inappropriate if the subject of imputation could not in fact have chosen to do otherwise than he did."); Onora O'Neill, *Book Review*, 100 *MIND* 373 (1991). O'Neill notes that without positive social support, human beings may lack the capacity for rational agency. For a relevant review of Onora O'Neill's book, see Stephen Engstrom, *Book Review*, 102 *ETHICS* 653 (1992). See also H.J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* 189 (1948) (discussing autonomy or free will as the ground of the dignity or absolute value of members of the "kingdom of ends," and humanity as dignified or worthy only insofar as it is "capable" of morality); VICTOR J. SEIDLER, *KANT, RESPECT, AND INJUSTICE: THE LIMITS OF LIBERAL MORAL THEORY* 22-25 (1986) (noting that "it is our rationality which is also the source of our dignity" and discussing humanity as possessing dignity "so far as it is capable of morality"); ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 197-99 (1989) (arguing that Kant leaves unclear who, as a rational autonomous agent, bears moral responsibility, as "moral personality refers to a rational agent's ability to act freely, that is, independently of the mechanisms of nature"); ROBERT P. WOLFF, *THE AUTONOMY OF REASON* 175-76 (1973) (describing Kant's distinction between "rational moral agents" and "things"); Andrew Ward, *On Kant's Defence of Moral Freedom*, 8 *HIST. PHIL. Q.* 373, 381 (1991) (stating that "the agent, qua noumenal subject, can be thought of as free and as responsible for his choice," whereas "desires and inclinations, sensuous impulses, are what Kant calls 'gifts or misfortunes of nature'"). It is tempting to conclude that there should be some categorical middle ground, if not a continuum, between free and autonomous rational moral reasoners on the one hand and mere "things" on the other. Otherwise, there is the risk that in imperfectly meeting the requirements of the former category, we will all be consigned, at least some of the time, to the latter category. If, on the other hand, we credit all humans with free and rational moral autonomy, even in cases of horrific backgrounds and extreme deprivation, merely because such persons could choose freely and autonomously if their horrific circumstances were to be radically transformed, we may be doing the real victims of such circumstances no great dignitary favor. What is crucial is not the capacity to act autonomously if one were to be liberated from severely constraining circumstances, but the liberation itself, and the subsequent free and responsible choices.

It is unfortunately not possible to avoid these issues by assuming that all "persons" bear responsibility for their acts. The term "person" ambiguously refers to those with actual or damaged capacities for developing plans of life but also acts as a mere synonym for "human being." CHARLES TAYLOR, *HUMAN AGENCY AND LANGUAGE* 97 (1985). Thus, whether all "persons" bear moral responsibility for their acts is unclear even if we think carefully about what it means to be a person, since it is unclear whether all human beings bear such responsibility.

10. The possibility that quantum mechanical processes may leave open the possibility not only of merely random mental events, but of genuinely free creative mental choice and full moral responsibility, is a genuinely fascinating topic. This Article, however, will spare

We need not deal with these deeper questions, however. Instead, we will trace the logic and application of the well-established legal principles that require punishment only for those who bear moral responsibility for an act. There is a basic contradiction when the principle of no legal guilt without moral responsibility is applied to the criminal law's disposition of an important class of defendants drawn from a group referred to here simply as the "most deprived." This group is drawn from those who have most severely and persistently been deprived, through no fault of their own, of what we will see below to be the requisites of moral responsibility. The criminal law systematically punishes substantial numbers of the most deprived who, despite their failure to fall into any currently recognized legal exception to the category of moral blameworthiness, cannot reasonably be said to bear moral responsibility for their charged conduct.

Generally, when the criminal law convicts those most deprived defendants who do not genuinely bear relevant moral responsibility, it fails to recognize that it is doing so. Instead, the law truncates the inquiry into moral responsibility, deforming the generally accepted concept of moral responsibility itself. The legal system thereby commits a demonstrable, systematic error of logic and language use.

It is tempting to assume that matters are more arbitrary than this. Surely it is impossible to accuse the legal system of self-contradiction in this respect with any decisiveness. Doubtless, ascriptions of responsibility are matters of politics. Whether a person or group is said to bear moral responsibility for an event is subject to bargaining,¹¹ which undoubtedly reflects differences in group power. It is, however, an exaggeration to suppose that since ascriptions of responsibility involve ideological or political struggle, we cannot establish the self-contradiction in legal prac-

the reader from such a discussion. For some tentative exploration of this and related topics, see DAVID HODGSON, *THE MIND MATTERS: CONSCIOUSNESS AND CHOICE IN A QUANTUM WORLD* (1991); TED HONDERICH, *A THEORY OF DETERMINISM: THE MIND, NEUROSCIENCE, AND LIFE-HOPES* 304-34 (1988); MICHAEL LOCKWOOD, *MIND, BRAIN AND THE QUANTUM* (1989); ROGER PENROSE, *THE EMPEROR'S NEW MIND* 400-04 (1989); Henry Margenau, *The Laws of Nature Are Created by God*, in *COSMOS, BIOS, THEOS* 57, 60 (Henry Margenau & Roy A. Varghese eds., 1992); Robert J. Russell, *The Meaning of Causality in Contemporary Physics*, in *FREE WILL AND DETERMINISM* 13, 23 (Viggo Mortensen & Robert C. Sorensen eds., 1987); Niall Shanks, *Quantum Mechanics and Determinism*, *PHIL. Q.*, Jan. 1993, at 20. See also R. George Wright, *Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics*, 18 *FLA. ST. U. L. REV.* 855 (1991). For a discussion of the potentially devastating effects upon current legal conceptions of intention and responsibility which could result from an eventual judicial acceptance of a through going materialist psychology, see Andrew E. Lelling, *Eliminative Materialism, Neuroscience and the Criminal Law*, 141 *U. PA. L. REV.* 1471 (1993).

11. See PETER A. FRENCH, *RESPONSIBILITY MATTERS* 2 (1992).

tices regarding responsibility.¹² The concept of responsibility, as endorsed by the established legal system, may in itself set important logical limits to its application. Those logical limits are violated demonstrably by the legal system's practices.

We need not therefore argue that there is some single correct or objectively best understanding of the idea of moral responsibility, though this Article will offer some strongly redistributionist and egalitarian recommendations. Instead, the strategy of this Article is to convict current legal practices of self-contradiction, leaving unresolved for the moment how to remedy such self-contradiction. Exposing this basic self-contradiction will absorb most of the remainder of the Article. While it is easy to show abstractly the self-contradiction in current legal practices regarding moral responsibility, this Article will also attempt to show the very real ramifications of this self-contradiction.

Consider, for example, a legal system that rejects convicting defendants who do not bear moral responsibility for their acts, and instead relies on our common, garden-variety understanding of moral responsibility. Suppose further that as a result of political struggle, the law decrees that any accounts of alleged causal influences on the defendant's conduct that extend back further in time than one year prior to the alleged offense are irrelevant. Plainly, there are possible inconsistencies between this legal rule and our common understanding of moral responsibility. Suppose that two years prior to the offense, a third party rewired the defendant's brain, or credibly threatened some hideous injury to the defendant's loved ones unless the defendant carried out the specified crime, an inconsequential trespass to land on a date two years hence. Of course, under

12. J.M. Balkin, among others, emphasizes the nonrational elements of ascriptions of responsibility. J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197 (1990). Professor Balkin argues that "[o]nce we see that existing views of human responsibility are merely constructs that are alternatively adopted and discarded in successive situations, we will understand that they are not necessary concomitants of the concepts of moral responsibility and desert." *Id.* at 201. Professor Balkin follows Mark Kelman in this regard, who has emphasized the "nonrationality" of attributions of responsibility. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 592-95 (1981). Professor Kelman argues that legal decisions regarding criminal responsibility are typically, though not invariably, biased by nonrational choices of framework, as in the case of choosing between a long- or short-term focus in conceptualizing responsibility. *Id.* at 594-95; see also MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY 4-5 (1993) (ascriptions of responsibility as reflecting political judgments and political power, rather than pure findings of fact); Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1541 n.53 (1992) (book review) (citing Marion Smiley).

It should be noted that even if the idea of moral or criminal responsibility is merely a social construct, it is still possible to convict the judicial system of using the idea inconsistently or incompatibly with a widely shared understanding of what the construct of responsibility involves.

the legal rules, the defendant can refer to her state of mind at the time of the offense, or within the prior year, but the legal system cripples her ability to argue persuasively for her nonresponsibility by barring her from introducing plainly relevant evidence of the events that occurred earlier than one year before the crime. The point is not that the legal system's "one prior year" rule is a bad rule. Rather, it is that the one prior year rule, as illustrated here, is plainly inconsistent with the common understanding of the workings of moral responsibility, an understanding the law purports to uphold.

Thus, it is possible not only to object to a legal system's practices regarding responsibility on normative grounds, but to convict it of inconsistency. Legal systems may not only do bad things; they may also contradict their own premises. It is possible for the legal system's defenders to respond by casting aside uncontroversial understandings of responsibility, thus restoring internal consistency to the legal system. This Article will briefly explore the unattractiveness of such a response. This Article first illustrates the actual contradiction involved in purporting to limit legal convictions to cases in which the defendant bears moral responsibility for the act in question,¹³ while simultaneously convicting substantial numbers of the most deprived for acts for which they cannot reasonably bear moral responsibility.¹⁴ This Article then briefly reflects upon the attractiveness of an unusual combination of legal progressivism, egalitarianism, and concern for freedom, with a strong emphasis on the moral value of responsibility. Such a combination, however uncommon, becomes possible once we fully recognize that moral responsibility depends upon appropriate kinds and degrees of freedom, knowledge, and control.

II. THE LOGIC OF RESPONSIBILITY

There are two general senses in which it may be wrong to impute moral responsibility to an individual. First, such an imputation may violate the logic of the concept of moral responsibility in itself. Second, the imputation may be unfair or unjust. Thus, an improper imputation of responsibility always violates the conceptual logic of responsibility, and in some cases may be unfair or unjust.

The "logic" of the concept of moral responsibility as used here is to be understood broadly. It includes all of the criteria for the concept's proper application in actual legal practice. By the "logic" of the concept, there-

13. See *supra* notes 3-4 and accompanying text.

14. Persons who do not bear moral responsibility for an act they have performed, even when the act is criminally prohibited, have not of course thereby acted "irresponsibly."

fore, we include not just misunderstandings of the meaning of the concept, but errors of fact or judgment in applying the concept. Assuming, for example, that starfish are as we ordinarily take them to be, to ascribe moral responsibility to a starfish is to betray an understanding of the logic of the concept of responsibility. This would be true even if doing so were popular, or were thought to promote human interests. Of course, one can stipulate any meaning and any set of criteria for moral responsibility. By imputing responsibility to a starfish, however, we violate our conventional understanding of the idea of responsibility. We similarly violate the logic of this concept, in a broad sense, when we commit errors of fact or judgment in applying the idea of moral responsibility in cases of mistaken identity, convictions for involuntary acts, or when we mistakenly believe a causal relationship to exist between a defendant's activities and some social harm.

The case of attributing moral responsibility to a starfish illustrates the possibility of illogical, but not unfair or unjust, applications of moral responsibility. It is logically wrong (in the sense of confused or contradictory) to place moral blame on the starfish, though not wrong in the sense of unjust. Even if it is possible to treat starfish unjustly, or to genuinely punish or blame them, imputing moral blame to starfish does not itself seem unjust. Judging someone unfairly or unjustly seems to presuppose that the object judged has a certain status, certain capacities, or certain actual or potential interests, to which the starfish cannot reasonably aspire.

It certainly is possible that the distinction between illogical and unjust ascriptions of responsibility is imperfect, as the broad conceptual logic of responsibility ordinarily involves certain considerations of justice or fairness. Thus, the logic of the concept may, for example, involve judgments as to what is reasonable and fair to expect of persons. Still, it is important to bear in mind the distinction between illogical and unfair imputations of responsibility. This is because it may well be possible to show how particular imputations of responsibility are illogical without resolving the more controversial issue of their fairness. Specifically, the judicial system may often commit self-contradiction in applying the logic of moral responsibility, even before resolving any question involving the fairness of imposing moral responsibility upon an individual. This is important, because we may be able to agree more readily that a concept is being applied inconsistently on its own terms than that a consistent application of the concept is fair or unfair. As such, detecting self-contradiction in judicial practice may be less controversial than claiming that the judicial system is in some respect unjust.

Of course, exposing contradictions in the logic of responsibility is not the end of the matter. If the logic of judicial practice of moral responsibility is in some respect self-contradictory, it is open to the judiciary to fashion any resolution to such contradiction. It is therefore possible for the courts to resolve a contradiction in the logic of moral blaming by continuing to blame the most deprived defendants, via endorsing new, looser standards of moral blame. Nonetheless, there will often be pressures of politics, logic, and fairness against repairing contradiction-riddled judicial practices by adopting an *ad hoc* reduction in what the courts deem logically required for anyone to be blameworthy.

What, then, is the logic underlying judicial ascriptions of moral responsibility? As the logic of responsibility is imbedded in complex social practices in which conflicting social interests are crucially at stake, we cannot realistically expect the judicial logic of responsibility to be as crisp and uncontroversial as the logic of geometric cosines. There is, however, sufficient societal and judicial consensus on the basic logic of responsibility to indicate that important contradictions exist between that basic logic and its application in social and legal practice. While understandings of the logic of responsibility admittedly will vary, at least in emphasis and detail, the logic of the concept is sufficiently clear for our purposes. Let us first briefly refer to the basic considerations without citation, leaving detailed development for the discussion below.

Part of the consensus is that the criminal law requires more than a defendant's fulfilling one simple prerequisite to impute properly moral responsibility to that defendant. The capacity to bear moral responsibility seems to have no simple, unitary essence. Certain requisites of moral responsibility focus on the party's capacities, and others on the party's situation or environmental circumstances. This contrast between individual capacities and circumstances admittedly is imperfect, as one's capacities and circumstances doubtlessly affect each other, at least over the long term. Further, other considerations relevant to moral responsibility seem to cut directly across the distinction between capacity and circumstance. In sum, responsibility cannot be based on some single criterion.

It seems clear by consensus that freedom, in some form and to some degree, is one requisite to moral responsibility. Interestingly, there seems to be roughly equal interest in what has been called volitional freedom, or freedom of the will, and in what has been called social freedom, which focuses on the number and value of the actually or reasonably perceivable alternatives open for selection by the party.

On the capacity side, there seems to be a consensus that in order to impute moral responsibility to a party, the party must possess a sufficient

degree of relevant knowledge. This may require knowledge of the party's own capacities, or of external considerations such as the availability, feasibility, or potential value of alternative options. The party as chooser must possess sufficient ability to predict the consequences of her own acts.

On the circumstance side, there is often a sense that for moral responsibility to attach, the defendant must have an awareness of some set of eligible alternative courses of conduct available to her. As we will discuss below, the relationship between moral responsibility and the availability of alternatives is complicated. Nevertheless, the idea of available alternatives does seem generally relevant to responsibility.

The idea of control also recurs in discussions of responsibility. This concept takes many forms. Control over one's circumstances or options is often relevant. In addition, some degree of what might be called self-control may also be requisite to responsibility. Control, from the standpoint of capacity, may refer to the criminal defendant or other party's cognitive and volitional abilities to envision or evaluate options, and the ability to choose between those options. Some sufficient degree of each of these capacities typically is thought necessary for responsibility to attach. More deeply, it is commonly thought that moral responsibility requires to some degree, the ability to select, formulate, revise, and abandon freely and without constraint the basic values or goals that ultimately inform and give substance to the actor's own choice.

This Article considers and documents a number of the above-mentioned criteria for moral responsibility. It is important to note that this Article does not merely string together a list of highly controversial assertions regarding the requisites of moral responsibility. It is fair to say that much, if not all, of the preceding outline is at least compatible with, if not fairly inferable from, most standard contemporary discussions of responsibility. Of course, many philosophers and some jurists would wish to revise radically or abandon altogether the idea of moral responsibility, but this Article again does not address such concerns, beyond pointing out unattractive consequences of such views.¹⁵

To begin documenting the idea of responsibility, it is necessary to consider the relationship between freedom and responsibility. A distinction is often drawn between social or political freedom and freedom of the will. The first few lines of the introduction to John Stuart Mill's essay *On Liberty* are devoted to just this distinction.¹⁶ No doubt social or political

15. See *infra* notes 121-34 and accompanying text.

16. See John Stuart Mill, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 5 (John Gray ed., 1991). In contrast, Hegel emphasized the linkage between social and volitional

freedom and freedom of the will are in some sense distinguishable. It would be a mistake, however, to adopt a radical separation of social or political freedom from freedom of the will. Moral responsibility is crucially dependent upon social and political freedom as well as freedom of the will. Neither of these sets of linkages is universal or invariable: it is possible to have a liberal democratic, politically free society consisting of organic robots utterly lacking free will. However, it is also clearly possible that the denial of social and political freedom to a group of persons may undermine freedom of the will, and ultimately that group's capacity for moral responsibility. The contemporary criminal justice system often refuses to recognize the significance of the linkage between social or political freedom and freedom of the will in finding defendants morally responsible for their crimes.

Part of the problem may stem from the fact that the law properly holds defendants morally responsible for some outcomes that they did not intend, as in negligence cases.¹⁷ That an act was committed intentionally, however, does not necessarily mean that it was performed with free will.¹⁸ Even if the law holds that individuals are responsible for the unintended outcomes of intentional acts, it does not follow that the law should find individuals responsible for outcomes that do not reflect free will.¹⁹ For instance, when a legal system holds an addict responsible for an act unreflective of the addict's free will, it typically is presumed that free will was relevantly exercised by that party at some earlier time, in this case the free choice to become an addict.

This dual aspect of freedom, encompassing both social or political freedom and volitional freedom or freedom of the will, has undergirded discussions of moral and legal responsibility since the time of Aristotle. For Aristotle, responsibility requires not just the actor's knowledge of the circumstances, but a deliberate choice to undertake that act, as well as the absence of any external compulsion.²⁰ Aristotle's insights linking political and volitional freedom to responsibility have been preserved to the present day.

freedom. Darrell Moellendorf, *A Reconstruction of Hegel's Account of Freedom of the Will*, THE OWL OF MINERVA, Fall 1992, at 5, 17.

17. See George Graham, *Doing Something Intentionally and Moral Responsibility*, 11 CAN. J. PHIL. 667, 668 (1981).

18. See L.S. Carrier, *Free Will and Intentional Action*, 16 PHILOSOPHIA 355, 355 (1986).

19. See, e.g., Randolph Clarke, *Free Will and the Conditions of Moral Responsibility*, 66 PHIL. STUD. 53, 55 (1992); Christopher S. Hill, *Watsonian Freedom and Freedom of the Will*, 62 AUSTRALASIAN J. PHIL. 294, 295 (1984).

20. See BODENHEIMER, *supra* note 7, at 32. Since Aristotle discusses issues related to freedom of the will and responsibility in several texts, however, the best source is the two-volume THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984).

The importance of both political freedom and volitional freedom or freedom of the will has, for example, been recognized by the contemporary philosopher Susan Wolf.²¹ Wolf observes that freedom and responsibility require not only the actor's "ability to govern her behavior in accordance with her deepest values,"²² but the "ability to form or revise her deepest values in light of the truth."²³ After all, even one's deepest values may have been coercively implanted. Moreover, the inability to act on our deepest values may reflect the actor's lack of political freedom. Wolf implicitly links the two sorts of freedom in noting that "[t]he more options and the more reasons for them that one is capable of seeing and understanding, the more fully one can claim one's choice to be one's own."²⁴ The linkage between the number of available options and social or political freedom to choose between those options reflects a familiar, commonsensical understanding of freedom. Someone who may select from a range of choices is normally freer than if she could select from only a proper subset of those choices. Wolf further argues that for moral responsibility to attach, the chooser must "understand the significant features of her situation and of the alternatives among which her choice is to be made."²⁵ This additional requirement of knowledge and understand-

21. SUSAN WOLF, *FREEDOM WITHIN REASON* (1990).

22. *Id.* at 140.

23. *Id.* at 141; see also Randolph Clarke, *Toward a Credible Agent-Causal Account of Free Will*, 27 *NOÛS* 191, 198 (1993) (raising the possibility that free will requires "a capacity for reflective, rational self-governance"). For a denial that moral blameworthiness requires this sort of freedom and control, see EUGENE SCHLOSSBERGER, *MORAL RESPONSIBILITY AND PERSONS* 117-18 (1992). Schlossberger's argument does not seem correct. Schlossberger is, for example, logically committed to the view that one who freely wishes to do evil, but whose brain has been rewired against her wishes to produce benign moral beliefs, commitments, concerns, and actions may in this respect be a proper subject of genuine moral praise. *Id.* It might be for some reason prudent to reinforce, manipulate, or publicize and reward such behavior, but moral praise would not be appropriate in any deep, genuine sense.

Schlossberger may be misled by his belief that mere free will, or free choice, by itself may not be particularly valuable or worthy. *Id.* at 118. It may be that free choice is not by itself of great value, if we can envision someone who, for example, has free choice, but by nature is incapable of having any significant effect on herself or on other people. Thus the value many of us see in free choice may really presuppose, for example, the ability to advance or hinder the interests of other people. We ordinarily think of free choice in just such situations. Free will therefore may be technically only a necessary condition for enormous moral value, but since the remaining conditions for moral value are normally fulfilled, it is usually harmless to think of free choice as sufficient for the presence of great moral value. Thus free choice is necessary, though perhaps technically not by itself sufficient, for the existence of such value.

24. WOLF, *supra* note 21, at 144.

25. *Id.* at 117; see also Susan L. Anderson, *A Picture of the Self Which Supports Moral Responsibility*, 74 *THE MONIST* 43, 52 (1991); Bruce N. Waller, *Natural Autonomy and Alternative Possibilities*, 30 *AM. PHIL. Q.* 73, 78 (1993) (discussing autonomy, as opposed to

ing may take on an important social and political dimension, as we will argue below. For the moment, it is hardly surprising that lack of political freedom may be linked to suppression of the unfree person's understanding of her own circumstances.

Another contemporary philosopher, Gary Watson, raises the possibility that persons subject to totalitarian mind control may "lack freedom . . . because their evaluational and volitional and other cognitive faculties have been impaired in certain ways. . . . [T]hey are incapable of effectively envisaging or seeing the significance of certain alternatives, [or] of reflecting on themselves and on the origins of their motivations."²⁶ While Watson refers to dramatic, hypothetical cases, it is argued below that the lack of freedom Watson describes may undermine the development of the capacity for responsibility among the most deprived members of contemporary society.

It seems clear that coercive restrictions of freedom may affect not only the victim's social or political freedom, but also the victim's capacity to bear moral responsibility for her acts and choices.²⁷ While coercion can

responsibility); Bernard Berofsky, Book Review, 89 J. PHIL. 202, 206 (1992) (reviewing SUSAN WOLF, *FREEDOM WITHIN REASON* (1990)); P.S. Greenspan, *Free Will and the Genome Project*, 22 PHIL. & PUB. AFF. 31, 37 (1993). For a further discussion of Wolf's views, see Lawrence Vogel, *Understanding and Blaming: Problems in the Attribution of Moral Responsibility*, PHIL. & PHENOMENOLOGICAL RES., Mar. 1993, at 129, 129-31; Richard Double, Book Review, 101 MIND 198 (1992) (reviewing SUSAN WOLF, *FREEDOM WITHIN REASON* (1990)).

26. Gary Watson, *Free Action and Free Will*, 96 MIND 145, 152 (1987). The importance of being able to reflect freely upon and to evaluate our own motivations is also crucial to Hegel's account of freedom of the will. Moellendorf, *supra* note 16, at 16. Hegel, however, goes on to specify that only a will rationally motivated in the service of its own freedom, or a will that aims at freedom itself, can be free. *Id.* For further recent discussions of the importance to free will and responsibility of the ability to rationally reflect upon, regulate, and revise one's reasons and values, see Clarke, *supra* note 19, at 54; Richard Foley, *Compatibilism*, 87 MIND 421, 427 (1978).

27. For the antagonism between coercion and responsibility, see John M. Fischer & Mark Ravizza, *Responsibility and Inevitability*, 101 ETHICS 258, 258 (1991); Harry G. Frankfurt, *Coercion and Moral Responsibility*, in *ESSAYS ON FREEDOM OF ACTION*, *supra* note 4, at 65, 75 ("A person who is coerced is *compelled* to do what he does. He has *no choice* but to do it. This is at least part of what is essential if coercion is to relieve its victim of moral responsibility . . ."). The literature discussing the admittedly varied possible approaches to the idea of coercion is substantial. See, e.g., ALAN WERTHEIMER, *COERCION* (1987); Michael Gorr, *Toward A Theory of Coercion*, 16 CAN. J. PHIL. 383 (1986); Joan McGregor, *Philips on Coerced Agreements*, 7 LAW & PHIL. 225, 226 (1988) ("[W]hen an agent does not understand the nature of the choice, the consequences of the choice, and the circumstances of the choice, then that agent does not act voluntarily. The agent does 'act' but is not responsible for his/her action."); Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79 (1981); Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440 (Sidney Morgenbesser et al. eds., 1969); Michael Philips, *Are Coerced Agreements Involuntary?*, 3 LAW & PHIL. 133 (1984); David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981).

preclude or diminish moral responsibility, it is important to avoid the error of supposing that coercion alone can undermine the freedom necessary for moral responsibility. In light of the diversity of approaches to the idea of coercion,²⁸ it is crucial to bear in mind that a person or group's freedom may be limited in a way that eliminates or reduces the capacity for moral responsibility, even in the absence of coercion. Government policy and legal practice may reduce freedom and the capacity for moral responsibility without, at least in a narrow sense, employing coercion.

The linkage of freedom, both political and volitional, to responsibility is illustrated further in the linkages of knowledge and control to the idea of responsibility. In certain respects, a party must possess knowledge and control in order for a party to have moral responsibility. Aristotle considered relevant knowledge to be a prerequisite to responsibility.²⁹ This theme was maintained classically³⁰ and in contemporary accounts of responsibility.³¹ Under these views, for responsibility to attach, one must have sufficient relevant knowledge of the nature of one's own action,³² the surrounding circumstances,³³ and the likely effects of one's act.³⁴ Lack of knowledge tends to preclude the exercise of moral responsibility. Of course, there may be cases in which an actor's ignorance is the actor's own fault. F.H. Bradley notes that "ignorance either of particular facts, or of moral distinctions generally, or of the moral quality of this or that act, removes, so far, moral responsibility, provided only that the ignorance itself be not imputable to us as a fault."³⁵

Thus one may still bear responsibility for an act or outcome, even if one chose on the basis of ignorance, as long as that ignorance was culpable. Broadly stated, ignorance of the law typically is thought not to excuse.³⁶ There are limits to this rationale reflecting the extent to which an

28. See sources cited *supra* note 27. These sources raise issues including the degree of normativity built into the idea of coercion, the relations among coercion and threats and offers, including market wage offers, and whether genuine coercion can fail in its aim.

29. See *supra* note 19.

30. See RICHARD SWINBURNE, *RESPONSIBILITY AND ATONEMENT* 49 n.18 (1989) (quoting THOMAS AQUINAS, *SUMMA THEOLOGIAE* 1a.2ae.73.6).

31. See *id.*; see also *supra* notes 24-26 and accompanying text.

32. See Gregory Mellema, *On Being Fully Responsible*, 21 *AM. PHIL. Q.* 189, 189 (1984).

33. See *id.*; C.T. Sistare, *Models of Responsibility in Criminal Theory: Comment on Baker*, 7 *LAW & PHIL.* 295, 319 (1989).

34. See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 202 (1987).

35. F.H. BRADLEY, *ETHICAL STUDIES* 42 (2d ed. 1927) (footnote omitted). For a slightly different slant on culpable ignorance, see BERNARD BEROFSKY, *FREEDOM FROM NECESSITY* 160-62 (1987). For a review of Berofsky's book, see David Widerker & Charlotte Katzoff, *Book Review*, 90 *J. PHIL.* 98 (1993).

36. See *Lambert v. California*, 355 U.S. 225, 228 (1957); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910). As the legal maxim has it, "*ignorantia legis neminem ex-*

actor's ignorance can realistically be said to reflect the actor's own fault. Oppressed groups may, for example, lack without culpability relevant knowledge of what the law requires. Their lack of knowledge may be the result of governmental and societal failure to provide oppressed groups with knowledge of what the law requires or adequate opportunity to acquire such knowledge.

For responsibility to attach, the allegedly responsible party must know about the society's moral and legal code and perhaps about society's likely view of the moral and legal status of one's acts. The actor need not, however, be capable of empathically grasping or seeing the point of morality, or of making genuine moral decisions. This is a controversial point. Recently, leading legal scholars have made contrary arguments asserting that only those who can make genuinely moral decisions for moral reasons can be held morally responsible.³⁷ In particular, they argue that responsibility cannot attach in the case of an otherwise normal person who can genuinely see no distinction between moral rules and conventional rules of etiquette, and who sees both sets of rules as senseless.³⁸

Despite their apparent logic, these arguments are ultimately implausible. Counterexamples seem clear. Among contemporary academics, for example, there are some conscientious, sincere moral skeptics and nihilists who consider themselves incapable of genuine moral decisionmaking. These thinkers see no difference between morality and arbitrary convention, and fail to grasp any genuine point to society's conception of morality.³⁹ It would plainly be wrong, however, to conclude that the studied conclusions of such academics can absolve them of moral responsibility for their actions.

It would be quite realistic to assume that such academics are otherwise in possession of all the requisites of responsibility. While they deny, cannot genuinely understand, engage in, or be motivated by moral considerations, it is still reasonable to hold such persons morally responsible. This is because given their otherwise normal capacities, they can presumably grasp how the institutions of law and morality will likely evaluate their acts, and can easily refrain from such acts. If they are not motivated by

cusat," or "ignorance of the law excuses no one." BLACK'S LAW DICTIONARY 747 (6th ed. 1990); see also sources cited *supra* note 2.

37. See Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1580 (1992); see also Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 733-34 (1992) ("For example, Peter Arenella contends that moral responsibility requires certain moral-emotional capacities beyond those mandated by chosen action." (footnote omitted)).

38. See Arenella, *supra* note 37, at 1580.

39. *Id.*

any premoral sense of empathy, they may be guided, at least, by the purely selfish motivational grounds of prudence, including the personal undesirability and probability of criminal punishment. Indeed, at least some moral skeptics excel at predicting how society and the legal system will morally evaluate their contemplated acts, and on just those prudential grounds can refrain easily from engaging in acts society will predictably condemn.

Perhaps the key to this logic is that a legal system's reaction is often quite predictable, even if its reasoning is thought by the moral skeptic to be mysterious. Persons do not need a moral sense to develop a workable grasp of what a legal system will call a homicide. Even if one sees no genuine moral difference between murder and self-defense, one can note the empirical correlates of self-defense, such as a prior shot by the victim. To be on the safe side, one can avoid homicide generally. Consider the matter from an anthropological perspective. It is possible to predict accurately how a culture will make certain moral or nonmoral distinctions, based only on one's observations of that culture, even if the observer finds those distinctions to be pointless or mysterious. Similarly, if a society's moral or legal response to homicides forms a reasonably consistent pattern, even those who deny their logic or are otherwise incapable of moral reasoning may be able to inductively grasp the likely consequences of those acts.

In other words, even the morally skeptical professor may have a sufficient, or "normal," ability and opportunity to act in accordance with what the presumably mysterious, although predictable, institutions of law or morality may require.⁴⁰ What sets academic moral skeptics apart from those persons subject to the most serious oppression is that the former have, and the latter may sometimes lack, a reasonable and realistic opportunity to grasp or absorb the majority's relevant legal and moral norms.⁴¹

These considerations take us beyond what we have called the cognitive or "knowledge" prerequisites to responsibility, and into the related broad area of the "control" prerequisites to responsibility. Persons may lack

40. See Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1129 (1985) (defining compulsion as an interference with one's normal capacity to behave morally or legally).

41. See Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9, 87 (1985). For an example of an extremely capable, thoughtful, and sensitive expression and defense of a relevant complete moral skepticism, see Mark Douglas Mercer, *On a Pragmatic Argument Against Pragmatism in Ethics*, 30 AM. PHIL. Q. 163 (1993).

relevant control over some of their own personal characteristics,⁴² external facts and events,⁴³ their own substantive choices or process of choice,⁴⁴ and their own lives,⁴⁵ and in relevant respects therefore bear reduced or no moral responsibility. One may, for example, lack control over one's own choice-making process for uncontroversial reasons, such as direct forceful coercion or involuntary addiction, which in turn uncontroversially tend to reduce or negate the chooser's moral responsibility.⁴⁶

The legal system is thus confronted with a syllogism whose major premise holds that those individuals relevantly lacking control should bear reduced responsibility for their acts and choices, whose minor premise holds that at least some subset of the most deprived lack such control, and whose conclusion therefore calls into question the responsibility of such persons. The legal system generally has avoided this conclusion by insisting that only a discrete set of nonsystemic, essentially personal, idiosyncratic, transient, or episodic excuses exhaust the conditions capable of negating moral responsibility. Thus, the legal system may, in assessing the criminal culpability of a defendant, consider whether the defendant is in a specified sense insane. The legal system in practice, however, is unlikely to go on to consider whether the defendant's grimly and involuntarily stultifying life-circumstances have otherwise negated any of the other logical requisites of responsibility discussed above. As we shall see, courts tend instead to make limited concessions to the logic of responsibility, at some cost to consistency, as when they admit evidence of the involuntary suppression or inhibition of the defendant's opportunities and capacities relevant to responsibility in the context of death penalty sentencing.⁴⁷

42. See, e.g., Norman O. Dahl, 'Ought' and Blameworthiness, 64 J. PHIL. 418, 427 (1967).

43. See, e.g., Norvin Richards, *Luck and Desert*, MIND, Apr. 1986, at 198, 198 (noting that luck plays an important role in the outcome of actions).

44. See, e.g., MARTHA KLEIN, DETERMINISM, BLAMEWORTHINESS, AND DEPRIVATION 2 (1990) (noting that early emotional deprivation can distort one's process of choice); Delgado, *supra* note 41, at 54-55, 64 (discussing the role of poverty and deprivation in generating criminal activity); Kent Greenawalt, *Distinguishing Justifications From Excuses*, LAW & CONTEMP. PROBS., Summer 1986, at 89, 92. C.T. Sistare refers specifically to the necessity to attach, to exercise "normal" control over one's actions. See Sistare, *supra* note 33, at 315. For a careful discussion of what sorts of freedom a deliberating person must believe herself to have, see Randolph Clarke, *Deliberation and Beliefs About One's Abilities*, 73 PAC. PHIL. Q. 101 (1992).

45. See, e.g., Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1267 (1976). This is not to suggest that Morse would be inclined to link control over one's life to economic class or poverty status, and to assign diminished responsibility on such basis.

46. See *supra* note 26 and accompanying text.

47. See *infra* part IV.

While the legal system engages in crucial inconsistencies in this regard, even those philosophers who devote themselves to such questions occasionally are guilty of what might be called a certain class insensitivity. Philosophers tend to focus on hypothetical exotica such as hypnosis, involuntary drugging, and high-tech brain control without bothering to test the extension of their results in more mundane social contexts. While it is no doubt useful for certain purposes to focus initially on clear, depoliticized, uncontroversial cases, too often this analysis is extended, if at all, only into the traditional legally-recognized categories of excuse. Even when philosophers consider broad concepts such as the effects of emotional strain or abnormal stress,⁴⁸ they often reduce the practical significance of their analyses by focusing on stress as an episodic, personal, or transient phenomenon, as opposed to the chronic, inescapable systemic horrors faced by the most deprived groups.⁴⁹

48. See, e.g., Paul Russell, *Strawson's Way of Naturalizing Responsibility*, 102 ETHICS 287, 289 (1992); Peter F. Strawson, *Freedom and Resentment*, in FREE WILL 59, 65 (Gary Watson ed., 1982); Gary Watson, *Responsibility and the Limits of Evil: Variations on a Strawsonian Theme*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 256, 265 (Ferdinand Schoeman ed., 1987). Watson's essay, which discusses at length the Robert Harris murder case, is a valuable exception to the traditional treatment of the concepts of emotional strain or stress.

49. One of the most widely respected contemporary legal philosophers, Michael S. Moore, gives aid and comfort to such a position. See Moore, *supra* note 40, at 1140. Moore wants to preserve moral realism and familiar moral judgments in the face of the conclusion that all human behavior is sufficiently caused. Moore, therefore, seeks to distinguish between mere causal influences on the exercise of our practical reason and compulsion, constraint, or impairment of that exercise, holding that only the latter sorts of effects on our practical reasoning can undermine responsibility. *Id.* Moore then generally concurs with the scope of the current familiar legal categories of nonresponsibility and he does not aggressively press on to consider the extent to which severely constrictive, stunting social environments may impair the exercise of or the ability to exercise sufficient practical reason.

It may well be the case that most severely deprived criminal defendants are capable of practical reason, in the sense of being sane, or having any given level of measured intelligence, or possessing creative, resourceful, resilient or adaptive traits. Nonetheless, a focus on practical reason in these senses should not detract from the various ways in which a person may be deprived of the capacity for responsibility. It is important to note how severe environmental influences may genuinely and substantially impair the development and exercise of those powers and capacities relevant to responsibility. Moore could avoid any threat of universal nonmoral responsibility by arguing that even if the child of privilege and the child of privation are in some sense equally caused to act as they do, the latter may be constrained, restricted, and impaired in ways qualitatively and quantitatively different than the former. The problem of why mere causation, as opposed to constraint, does not also impair responsibility could be raised, but this is already a problem on Moore's own account, and which he already has sought to address. Moore's approach has been widely discussed. See, e.g., Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2265-68 (1992) (arguing that Moore's causal theory of excuse cannot, as a matter of logic, be reconciled with the reality of determinism); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, LAW & CONTEMP. PROBS.,

One final aspect of control deserving some attention is that the relationship between moral responsibility and freedom, in the sense of having open and available alternative courses of action, is not as clear as is sometimes imagined. As it turns out, one cannot invariably infer lack of responsibility from the lack of all sorts of freedom. Without delving into the intricacies of how to express the ideas with maximal precision, it is fair to say that we often assume that free will cannot exist without open alternatives available for choice,⁵⁰ that freedom requires that the chooser have available to her some other choice,⁵¹ or at least that the chooser have the ability to have chosen otherwise.⁵² Similarly, it is often assumed that one can be held responsible only if one had the ability to refrain from acting as one did,⁵³ or that responsibility can attach only if one had the ability to choose otherwise, perhaps along with cases in which one's inability to choose otherwise is one's own fault.⁵⁴

However, moral responsibility can attach in some cases even where the actor was nonculpably unable to do otherwise, or where only one course of conduct is truly open to that actor. Though this may sound odd, familiar examples are not hard to find. Presumably, we might hold ourselves accountable for our choice in favor of some huge moral and personal good over some literally repulsive moral and personal evil,⁵⁵ even if we

Summer 1986, at 47, 60 n.27 (discussing the basis of excuse); John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045, 2058-60 (1988) (examining Moore's reconciliation of determinism and responsibility by distinguishing between causation and compulsion).

50. See, e.g., ANTHONY KENNY, *THE METAPHYSICS OF MIND* 82 (1989).

51. See, e.g., Patricia Greenspan, *Unfreedom and Responsibility*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS*, *supra* note 48, at 63. Bernard Williams recently has argued that true freedom is not reduced by all socially imposed constraints or limitations on choice, but only by those intentionally imposed, designedly and systematically, to reduce the victim's choices. See BERNARD WILLIAMS, *SHAME AND NECESSITY* 153-54 (1993). We may rightly respond that the sense of freedom at stake in the logic of responsibility, at least, is not so narrow. Nor do other writers invariably follow Williams in so narrowly construing political freedom. See, e.g., Craig L. Carr, *On Being Free to Choose*, 17 J. VALUE INQUIRY 203 (1983). Williams' narrow approach does not seem well advised in other contexts. Not all genuine restrictions of freedom need involve what might be called malice or specific intent, as Williams seems to require. It is not difficult to conceive of a society that inadvertently creates and sustains a discrete class of impoverished, powerless, unfree persons, where such an outcome is unintended and a matter of indifference to the majority. See, e.g., WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 3-20 (1987).

52. See, e.g., Hill, *supra* note 19, at 295.

53. See, e.g., John T. Saunders, *The Temptations of "Powerlessness"*, 5 AM. PHIL. Q. 100, 107 (1968).

54. See, e.g., C.A. CAMPBELL, *IN DEFENCE OF FREE WILL* 37 (1967); Phillip Gosselin, *The Principle of Alternate Possibilities*, 17 CAN. J. PHIL. 91, 92 (1987); Peter van Inwagen, *Ability and Responsibility*, in *MORAL RESPONSIBILITY* 153 (John Martin Fischer ed., 1986).

55. See, e.g., DANIEL C. DENNETT, *ELBOW ROOM* 135 (1984); Clarke, *supra* note 19, at 64-65. Cf. Roderick M. Chisholm, "He Could Have Done Otherwise," 64 J. PHIL. 409, 411

found ourselves in some sense unable to choose otherwise. The philosopher Harry Frankfurt and others⁵⁶ have raised cases of "over-determination," in which Person A freely decides to murder Person B and does so unwaveringly, but where Person C has surreptitiously implanted a device in A's brain that would inevitably have forced A to carry out the murder even if A had at some point decided not to do so. The lesson of such cases is thought to be that A can be morally responsible for murdering B, perhaps along with C, even though, given the implanted device, A could not have done otherwise.⁵⁷

Before considering the circumstances of the most deprived, it is necessary to enter a crucial observation based on prior conclusions. The legal system cannot simply infer the responsibility of any member of a deprived group from the belief that even the most deprived persons act conscientiously and intentionally to maximize their values.⁵⁸ In a phrase, rational behavior does not imply responsibility. While even the poorest of the poor may act in a rational, adaptive, imaginative, or creative way, this does not imply their responsibility for those choices. One might act rationally even under the most severe and inescapable restrictions on one's choice. For example, someone who is being coerced by an armed robber may intentionally and rationally maximize her values by complying with the robber's demands.⁵⁹ She may, even while acting under such

n.4 (1967) (discussing George Washington's reputed inability to lie); J. Ralph Lindgren, *Criminal Responsibility Reconsidered*, 6 LAW & PHIL. 89, 99 (1987) (discussing Martin Luther's literal claim to be unable to act otherwise).

56. Several of Frankfurt's relevant papers, along with some critical reactions, are collected in *MORAL RESPONSIBILITY* (John Martin Fischer ed., 1986). See also Fischer & Ravizza, *supra* note 27, at 258-60; Margery B. Naylor, *Frankfurt on the Principle of Alternate Possibilities*, 46 PHIL. STUD. 249 (1984); Eleonore Stump, *Sanctification, Hardening of the Heart, and Frankfurt's Concept of Free Will*, 85 J. PHIL. 395 (1988). Susan Wolf points out that we may ascribe responsibility in such cases if we believe that the actor's preferences in the matter were freely arrived at. Susan Wolf, *The Importance of Free Will*, 90 MIND 386, 395 (1981).

57. For purposes of this Article, it is unnecessary to pass judgment on the merits of these arguments. Even if they complicate or sever certain linkages between particular sorts of freedom and responsibility, they do not seem to bear upon the kinds of deprivation examined below. They certainly do not establish the universal moral responsibility of the most deprived. The examples above work best when they assume that a broadly free, knowledgeable agent exercises the relevant sorts of control, who is then either "confronted" by the inescapable implications of her own autonomously chosen value system, "dictating" a choice, or, in the latter case, carries out the murder in accordance with her free choice or finds her free and responsible decision to change her mind being "overruled" by the implanted brain device.

58. *But cf.* Carrier, *supra* note 18, at 363 (explaining that moral responsibility is a matter of intentional value maximization).

59. See, e.g., Wright Neely, *Freedom and Desire*, 83 PHIL. REV. 32, 37 (1974).

extreme duress, creatively manage to improve her position in some way. Yet she may well not bear moral responsibility for acting as she does.

It is not necessary, of course, to found a claim of the nonresponsibility of the most deprived on the assertion that government or society coerces their behavior. When the most deprived nonculpably lack the requisite kinds and degrees of freedom, knowledge, and control, their responsibility is undermined, even in the absence of any malicious intent upon the part of the broader society to deprive them of the ability to make free choices.⁶⁰ Nor is it decisive for the issue of responsibility whether the most deprived feel responsible or identify with their choices.⁶¹ A deprived group may well be socialized to believe that they bear responsibility for their own choices. The question remains whether they are in fact responsible, and whether in identifying with their actions they have done so freely, or would do so under conditions of true freedom.⁶²

III. RESPONSIBILITY AND THE MOST DEPRIVED

This Article has thus far offered some indication of what is necessary for persons to be said to bear moral responsibility for their acts. It is now necessary to show that significant numbers of persons lead lives that in crucial respects, or at crucial junctures, do not possess those requisites of responsibility, but who are nevertheless systematically treated by the legal system as though they did. To show this convincingly would require a vivid portrait, true and whole, of the lives of the most deprived. While reasonable approximations of such a portrait are possible,⁶³ we will not undertake such a Dickensian task here. Instead, this Article will simply connect brief abstract descriptions of relevant circumstances with the criteria for responsibility set forth above.

The discussion focuses on those previously referred to as the most deprived. Obviously, this term involves elements of evaluation and comparison. The term has, at least, enough intuitive substance so that we can say that the most deprived neither bear nor lack responsibility simply by definition. While the idea of a class of individuals as the most deprived is

60. See *supra* note 27 and accompanying text.

61. But cf. Gerald Dworkin, *Acting Freely*, 4 *NOÛS* 367, 377 (1970) (arguing that freedom is linked to identification with one's beliefs).

62. See *supra* notes 21-25 and accompanying text (arguing that the reduction of responsibility through coercion, especially by the state, increases the complexity of the issue of blame).

63. See, e.g., ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* (1990); ANDREW HACKER, *TWO NATIONS* ch. 1 (1992). For a brief description of the broader context of contemporary urban life, see CORNEL WEST, *RACE MATTERS* 5-7 (1993).

obviously vague, it is evocative enough for our limited purposes. The term is no more vague, and a good deal less pejorative, than possible alternatives, such as "lumpenproletariat"⁶⁴ or "underclass."⁶⁵

In any event, it is recognized across the political spectrum that substantial numbers of persons are born into and live their lives amidst conditions of remarkable deprivation, in comparison to the broader society. Similarly, it is a commonplace idea that "people cannot choose their early environment—the kind of family or neighborhood into which they are born."⁶⁶ Horrific social and economic environments can plainly and undeniably impact on individuals in a substantial manner.⁶⁷ Many members of the middle class and a few others may be tempted, for purely self-interested reasons, to deprecate or deny the importance of such effects.⁶⁸ This denial is, however, unreasonable. Some persons face from childhood and through no fault of their own "a frightening array of negative forces: deprivation, concentration, isolation, discrimination, poor education, and the movement of jobs away from central cities."⁶⁹ The cumulative impact of these and other forces may "be hard for even the strongest and most concerned parents to fight."⁷⁰

64. For the inescapably negative connotations of "lumpenproletariat," see THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1144 (2d ed. 1987).

65. For examples of attempts at defining an "underclass," see Carol D. Petersen, *Can JOBS Help the Underclass Break the Cycle of Poverty?*, 26 J. ECON. ISSUES 243, 246 (1992) (arguing that researchers have not agreed on a common definition of the underclass, rather, they focus on different factors including persistent poverty, patterns of behavior, or a weak attachment or access to the labor force); Erol R. Ricketts & Isabel V. Sawhill, *Defining and Measuring the Underclass*, 7 J. POL'Y ANALYSIS & MGMT. 316, 316-17 (1988) (recognizing the definition is subject to arbitrary and subjective conceptualization). For the negative connotations of "underclass," see Isabel V. Sawhill, *The Underclass: An Overview*, PUB. INTEREST, Summer 1989, at 3 [hereinafter Sawhill, *The Underclass*]; see also William J. Wilson, *Studying Inner-City Dislocations: The Challenge of Public Agenda Research*, AM. SOC. REV., Feb. 1991, at 1, 5-6. For a pairing of "underclass" and "lumpenproletariat," see Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, SOCIAL PROBS., Oct. 1985, at 1, 5.

66. Sawhill, *The Underclass*, *supra* note 65, at 12.

67. See *id.* (discussing the impact of an individual's self-esteem as well as diminished future prospects).

68. See *id.* at 11-12. Given the role of ideology and the assumed harshness of experience among the most deprived, it is not surprising that such persons currently may wish to hold themselves fully responsible. While such persons doubtless know themselves and their own circumstances best, severe deprivation may limit such persons' appreciation of the roles of freedom, knowledge, and control in proper ascriptions of responsibility. See Waller, *supra* note 4, at 47-48.

69. DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 200 (1988); see also Wilson, *supra* note 65, at 10.

70. ELLWOOD, *supra* note 69, at 200.

Persons in such circumstances are, in many instances, subjected to conditions that strongly tend to preclude or impair responsibility, including lack of relevant freedom, lack of relevant control, and lack of relevant knowledge. The individuals live their lives in real or reasonably and nonculpably perceived isolation from institutions and opportunities that might permit them to escape from such an environment and its powerful influences.

Over the last few decades, the most deprived have found themselves increasingly isolated, informationally and geographically, from employment opportunities holding the promise of a stable, economically conventional life style.⁷¹ This economic isolation in turn reinforces a broader cultural isolation⁷² that reflects and exacerbates the elements of lack of relevant control, freedom, and knowledge of available escape routes and alternatives.⁷³ The absence or minimalization of these elements is, as we have seen, crucial to the absence of responsibility under our common understanding of the concept.

Doubtless the existence of some limited number of minimum wage jobs, lacking significant health insurance or other benefits, is within the scope of knowledge fairly ascribable to even the most deprived. In a sense, every able-bodied person could be charged with a culpable failure to seize such minimum opportunities.⁷⁴ Indeed, there is a sense that many of the most deprived should be held accountable for not seeking and obtaining one of a small number of available minimum wage jobs, even if the ratio of unemployed persons to the number of job openings is such that most jobseekers cannot be accommodated.

71. The trend toward relocation of industrial manufacturing jobs away from central cities is an important factor engendering this isolation. See ANDERSON, *supra* note 63, at 240 (noting that such industrial departures leave "a vacuum in the city's economy, with the economic and social burdens falling most on those who have fewest resources to deal with them"); see also *The Underclass: Hearing Before the Joint Economic Comm.*, 101st Cong., 1st Sess. 23 (1989) [hereinafter *Hearing*] (testimony of Lawrence Mead, Associate Professor, New York University); Isabel V. Sawhill, *What About America's Underclass?*, CHALLENGE, May-June 1988, at 27, 33; Wilson, *supra* note 65, at 6; William J. Wilson, *American Social Policy and the Ghetto Underclass*, DISSENT, Winter 1988, at 57, 58.

72. See J. David Greenstone, *Culture, Rationality, and the Underclass*, in THE URBAN UNDERCLASS 399, 406 (Christopher Jencks & Paul E. Peterson eds., 1990); see also WEST, *supra* note 63, at 5.

73. Professor Thomas Cook has argued that the most deprived "want to be so dreadfully, terribly middle class. They just don't know how to do it." CHI. TRIB., THE AMERICAN MILLSTONE 225 (1986) (quoting Thomas Cook, Northwestern University). Planning, when it is not impaired by the reasonably perceived absence of incentives, tends to be unrealistic. See also *Hearing*, *supra* note 71, at 65 (testimony of Ronald Mincy, Research Associate, The Urban Institute) ("Just because a job is out there, one has to know who the employers are, how to get the jobs, and a number of other things.").

74. See Sawhill, *supra* note 71, at 34.

The problem, though, is that many of the most deprived believe either correctly or nonculpably incorrectly that such jobs cannot reasonably be expected to lead to societal respect or sustain the material foundation for a stable, economically conventional adult existence.⁷⁵ This leaves many of the most deprived either with unrealistic hopes for dramatic financial success, perhaps abetted by national entertainment media, or with a fatalistic sense "that no matter what they do, their lot has been determined."⁷⁶

Even where such a belief may be false, those holding such a belief may not be culpable. This subjective sense of lack of relevant control among the most deprived is widely thought by many observers to in fact be realistic, and to reflect cultural and economic realities genuinely beyond the control of individual persons,⁷⁷ however defeatist its implications.⁷⁸ For those trapped by these realistic perceptions and realities, "it would be irrational . . . to act as though they will soon be engaging in mainstream economic life."⁷⁹ The fact that these beliefs may be mistaken cannot in itself serve as a general basis for ascribing responsibility to those reasonably holding such beliefs.

Moral responsibility cannot be ascribed simply on the basis of the rational, realistic, adaptive behavior engaged in by the most deprived. Responsibility requires, as a predicate, not merely behavior that is in some sense creative or rationally adaptive, but behavior that reflects freedom, control, and knowledge in relevant respects and in sufficient measure. Such elements are, in many cases, simply not present. Many of the most

75. See *id.*

76. CHI. TRIB., *supra* note 73, at 145 (quoting Chicago School Superintendent Manfred Byrd, Jr.).

77. See, e.g., *Hearing*, *supra* note 71, at 23-24 (testimony of Lawrence Mead); *id.* at 43 (testimony of Elijah Anderson, Professor of Sociology, University of Pennsylvania); KEN AULETTA, *THE UNDERCLASS* 35 (1983) (discussing the work of Oscar Lewis); CHI. TRIB., *supra* note 73, at 46 (quoting Pierre de Vise, Urbanologist, Roosevelt University); ELLWOOD, *supra* note 69, at 214; Elijah Anderson, *Neighborhood Effects on Teenage Pregnancy*, in *THE URBAN UNDERCLASS*, *supra* note 72, at 375; John J. DiIulio, Jr., *The Impact of Inner-City Crime*, PUB. INTEREST, Summer 1989, at 28, 32, 34.

78. This is, of course, not to suggest that the most deprived systematically lack initiative; that would often be inconsistent with sheer physical and economic survival. See Kathryn Edin, *Surviving the Welfare System: How AFDC Recipients Make Ends Meet in Chicago*, 38 SOCIAL PROBS. 462 (1991). Nor is it to minimize overt collective political activity engaged in by the most deprived. See, e.g., Lynda A. Ewen, *All God's Children Ain't Got Shoes: A Comparison of West Virginia and the Urban "Underclass"*, 13 HUMANITY & SOC'Y 145, 149 (1989). Resistance to the constraints one faces, however, does not necessarily make those constraints any less real.

79. Gaither Loewenstein, *The New Underclass: A Contemporary Sociological Dilemma*, 26 SOCIOLOGICAL Q. 35, 41 (1985).

deprived face coercion by peers,⁸⁰ some degree of continuing societal racism,⁸¹ and other more material sorts of barriers and constraints. Aside from the geographic, financial, or purely epistemic barriers to particular jobs, the most deprived may, for whatever reason, simply not be wanted by the more desirable employers. Christopher Jencks reports that "[s]uburban manufacturers do not advertise their vacancies in places where inner-city blacks would learn about them (major metropolitan dailies or the state employment service, for example), because they do not want those applicants."⁸²

Even when the most deprived choose between equally eligible options, such as the choice between remaining in school and leaving, or between drug use and the avoidance of drugs, the choice may either appear to involve only minimal differences in moral or other value, or somehow to be constrained. It seems fair to conclude, for example, that much drug addiction among the most deprived reflects not an informed and unconstrained search for transient gratification, but a much more negative sort of choice: a sort of vague, lingering suicide.⁸³

These considerations illustrate, however inadequately, some of the relevant dimensions of life for those classifiable as the most deprived. There would appear to be substantial numbers of persons who live their lives in circumstances hostile or indifferent to what we have seen to be the essential requisites of bearing moral responsibility. How, then, does life in such circumstances square with bearing moral responsibility?

Certainly, this is not a matter of the mere predictability of anyone's actions. We admittedly cannot show that someone was not responsible for an act merely by the successful prediction of that act. It may be predictable that most persons quietly offered a no-strings choice between two dollars or one dollar will choose the former. Mere predictability, however, does not by itself imply any relevant sort of constraint; some choices may simply be uncontroversial and exercised with full responsibility.⁸⁴ Conversely, though, we should not assume the moral responsibility of the most deprived merely because their choices differ substantially in apparently similar contexts. Persons who appear to have led similar lives may in fact have had relevantly different histories, influences, burdens, and resources. Small initial differences may be magnified or compounded into great differences at later stages. The observable differences

80. See ANDERSON, *supra* note 63, at 84.

81. See Katherine O'Sullivan See, *Comments from the Special Issue Editor: Approaching Poverty in the United States*, 38 SOCIAL PROBS. 427, 428 (1991).

82. CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY* 123 (1992).

83. See JONATHAN KOZOL, *SAVAGE INEQUALITIES* 192 (1991).

84. See Moore, *supra* note 40, at 1118; Vogel, *supra* note 25, at 132.

in the background or history of those who can and cannot be held responsible for their acts need not be large.

While it therefore may be incorrect, or at most only a "second-best" approach, to assume that all those subjected to the most dismal life circumstances cannot reasonably be held morally responsible, it is similarly wrong to infer universal moral responsibility from the common examples of success in overcoming harsh social conditions in socially approved ways.

Undoubtedly, most members of even the most deprived societal groups must be remarkably creative and adaptive in order to survive, and are generally lawabiding.⁸⁵ By analogy, some alcoholics and drug addicts are capable of dramatic behavioral changes, with or without treatment.⁸⁶ But these capabilities do not themselves resolve the important questions of moral responsibility.⁸⁷ Certainly the ability to cope with genuine lack of freedom does not show that one is free. Persons who overcome extreme poverty and deprivation through diligent effort and without remarkably unusual luck may come to bear responsibility only through their heroism or saintliness, and it would be unreasonable for the law to universally demand such extraordinary capacities as its minimal standard.⁸⁸

These ascriptions of responsibility must be reasonable in their expectations and demands.⁸⁹ It is tempting for any number of reasons, including a subtly mistaken understanding of the dignity and infinite value of all persons, to hold the most deprived morally responsible, with only the standard, narrow legal exceptions.⁹⁰ This, however, is ultimately harmful to the most deprived, and the logic of responsibility precludes such an approach, however advantageous or satisfying it might be on other grounds.

To see this, it is only necessary to think by analogy about the nature and effects of literal, physical obstacles and barriers with which people may be confronted. Consider an athletic high jump event. Through adjusting the height of the bar, the percentage of those clearing the established obstacle can be anywhere from zero to one hundred. Let us

85. See, e.g., Morse, *supra* note 45, at 1252.

86. See, e.g., Boldt, *supra* note 49, at 2302.

87. See Bruce N. Waller, *Hard Determinism and the Principle of Vacuous Contrast*, 19 METAPHILOSOPHY 65, 65 (1988).

88. See, e.g., DAVID L. BAZELON, QUESTIONING AUTHORITY 13 (1988); Delgado, *supra* note 41, at 67-68.

89. See BAZELON, *supra* note 88, at 8; Bernard Berofsky, *On the Absolute Freedom of the Will*, 29 AM. PHIL. Q. 279, 283 (1992).

90. See, e.g., JENCKS, *supra* note 82, at 141 ("[T]he solution cannot be to tear up the moral contract or to deny that the poor are responsible for their behavior."); Richard P. Nathan, *Will the Underclass Always Be with Us?*, SOCIETY, Mar.-Apr. 1987, 57, 62.

suppose that the bar has been set such that seventy percent of the contestants have been able to clear the height, while thirty percent have failed. Suppose further that all of the contestants appear to be physically similar or at least that differences seem random in their effects, that they have similar training histories, and that they have jumped under similar conditions. How would we think of the minority who failed to clear the height?

One possible interpretation would be that those who failed deserved, for one reason or another, to fail; perhaps they faced an earlier choice between self-indulgence and the discipline of additional training, and freely chose the former when they readily could have chosen otherwise. In any individual case, however, and even as an aggregate explanation, we would normally expect such responsibility-based explanations to play only a limited role. Even among self-selected athletic contestants, we would normally expect a multitude of considerations for which the individual contestant cannot reasonably be praised or blamed to influence the outcome. Most obviously, individual effort cannot compensate for differences in access to training facilities or for sheer individual physiological limits on one's jumping ability.

In short, that an obstacle can be surmounted by some or many similarly situated people does not mean that failure to overcome that obstacle is, even in a nonmoral sense, blameworthy, or the fault or responsibility of those who fail.⁹¹ Nor, in the world with which we are familiar, do those who fail to conform their behavior to established legal expectations have much control over what heights they will be legally expected to clear. The bar is set and can be insurmountable for them, despite their best efforts at all relevant times and despite the fact that many others are able, heroically or as a matter of casual, almost effortless routine, to clear the same height.

It is possible, if rare, to encounter a defendant who has led a life of severe deprivation and who has apparently lacked all relevant control, options, freedom, and knowledge, but nonetheless really acted freely and responsibly in committing the charged offense. Obviously, we could appreciate the defendant's situation only if a better understanding of the

91. For discussions of culpable ignorance, culpable inability to do otherwise, and culpable failure to reflect upon one's moral circumstances, see JONATHAN GLOVER, *RESPONSIBILITY* 176-78 (1970); James Montmarquet, *Epistemic Virtue and Doxastic Responsibility*, 29 *AM. PHIL. Q.* 331, 331 (1992); Holly Smith, *Culpable Ignorance*, 92 *PHIL. REV.* 543 (1983); Michael J. Zimmerman, *Moral Responsibility, Freedom, and Alternate Possibilities*, 63 *PAC. PHIL. Q.* 243, 245 (1982); John M. Fischer, Book Review, 101 *ETHICS* 408, 409 (1991) (reviewing MICHAEL J. ZIMMERMAN, *AN ESSAY ON MORAL RESPONSIBILITY* (1988)).

defendant's history and circumstances were somehow available. Thus, we admittedly cannot rule out the occurrence of "false negatives" in matters of responsibility. There will be similar false negative cases associated with any recognized legal excuse, including insanity; some persons found legally insane may actually be sane. Feigning the adverse effects of long-term severe deprivation does not seem much easier than feigning insanity. Therefore, there seems no sound reason to ignore extreme deprivation as a category of legal excuse unless we have reason to believe that the percentage of such "false negatives," where courts let a genuinely responsible party off the hook, is especially high.

Additionally, there is the problem of setting a reasonably accurate but ascertainable boundary line for judicial purposes. To ascribe responsibility to a defendant, courts must determine how much of what sorts of freedom, control, and knowledge in fact exist in a particular case. Precision is impossible in such determinations. The courts can err in imposing moral responsibility where persons in apparently similar circumstances avoid criminal acts, and conversely. However, unless we have reason to believe that a disproportionate number of cases will be false negative cases, at least compared with other legal excuse categories, it is obviously worth setting some reasonable legal standard, despite some degree of arbitrariness in practice.

The refusal to set any standard is the far more serious moral error of pretending that a substantial, reasonably identifiable group of severely victimized persons does not exist, and on that basis, inflicting undeserved punishment. When a court mistakenly holds a victim of severe deprivation not to be responsible for her acts, it is erring in favor of someone with whom few would care to trade places. Moreover, mistakenly finding someone not to bear responsibility for their acts does not imply that such a person should simply be returned to the community with a license to commit antisocial acts. In any event, to refuse to recognize the possibility of nonresponsibility due to severe deprivation is to fail to recognize the profound moral importance of reforming the conditions of social life so as to maximize the percentage of persons who can genuinely and correctly be considered fully and morally responsible.

To accommodate an obvious objection, though, it may be useful to complicate superficially this particular athletic metaphor. Most potential defendants, even the victims of the most severe deprivation, can on any given, specified occasion, refrain from violating any relevant legal rule. Such persons can, as it were, clear the bar on any single specified occasion. It does not follow, however, that we can attach moral responsibility to those defendants based on that isolated success.

Thus, the fact that a defendant is held not to be responsible for her otherwise criminal act does not mean that she will inevitably commit that act on every available occasion. Being capable of clearing a particular height a limited number of times per day does not show that one also has the ability to spend all day successfully clearing the height on every occasion. Similarly, a person may not bear moral responsibility for an act even though she could, at least on that particular occasion, have done otherwise.⁹² A person may have the ability to refrain from a crime on some specified single occasion, while genuinely lacking the ability to refrain from that or a similar kind of act on all occasions over a period of years, if confined to particular sets of social circumstances. Conceivably, one might not bear moral responsibility for one's addiction-induced behavior, yet be capable on some or any specified single occasion of not acting in accordance with one's addiction. The strength and peremptoriness of an addiction may vary over time.

Similarly, within the narrow class of recognized legal excuses, the courts may find someone not responsible due to insanity, without implying that the insane defendant would inevitably commit any crime.⁹³ For example, outside of the criminal context the courts might hold an industrial worker morally responsible for failing to remove her fingers from a piece of machinery on some single occasion specified in advance, but not hold her morally responsible for her own injury if she is called upon to remove her fingers hundreds of times each day and the actual instance of her injury involves no special occasion.⁹⁴ Again, in such repetitive movement injury cases, the courts may find the plaintiff not responsible for her own injury without implying that the particular accident, or any accident at all, was truly inevitable.

Such inferences are in some respects undoubtedly disturbing to middle-class sensibilities. Too often, our willingness to impute responsibility to the most deprived "is based loosely on a picture of *me now, being there then*."⁹⁵ Most middle class persons, if parachuted into an area of concentrated poverty and limited opportunity, would feel no immediate attraction to violate familiar behavioral norms. This is, however, hardly the

92. See, e.g., Terence Horgan, 'Could,' *Possible Worlds, and Moral Responsibility*, 17 S.J. PHIL. 345, 354 (1979); Watson, *supra* note 48, at 275 (arguing that an appropriate reaction to the Robert Harris biography, culminating in murder, "is not 'It had to be!' but, again, 'No wonder!'").

93. This point can and should be taken into account even by the so-called "choice" theories of excuse, which tend to focus, in potentially misleading fashion, on the defendant's capacity or opportunity to have acted otherwise at the time of the offense in question. See, e.g., Moore, *supra* note 4, at 29.

94. See, e.g., *Shaw v. Colonial Room*, 175 Cal. App. 2d 845 (1959).

95. Browne, *supra* note 4, at 353.

issue. Unfortunately, the unreflective middle class sensibility in this regard is translated into judicial policy.

A certain amount of progress can be made by asking what the law reasonably could require of us, had we been subjected to the depredations visited upon a particular defendant.⁹⁶ This inquiry, however useful in encouraging empathy and imaginative sensitivity, eventually breaks down. Some middle class persons may give themselves the benefit of the doubt as to how they would have acted. Some may quite sensibly suggest that it is merely uninformatively true that if they had been subjected to exactly the circumstances, background, influences, and burdens as a given criminal defendant, they of course would have acted similarly. Others may rightly point out a serious problem in the logic of identity: to the extent that I am placed precisely in the complete relevant circumstances of another, it makes little sense to think of me as the person I was, as opposed to the person whose conduct I set out to evaluate: the initial comparison becomes blurred.⁹⁷

One way around this problem of identity is to think not in terms of in essence becoming another person, but rather in terms of a proportion. While we may still start by wondering whether we could ourselves reasonably be held morally responsible for violating a particular norm, we must also imagine that the ratio of constraints to resources we face is the same as that faced by any person to whom we propose to impute moral blame. Thus, we may continue to think of ourselves in many respects as we are, but we must then imagine ourselves facing unusually daunting obstacles to our continuous adherence to legal norms.

The main problem these sorts of arguments face is psychological. Historically, it has been both accurate and progressive for judicial systems to think in terms of equality of moral responsibility. Although persons are created equal in their moral status, it is neither accurate nor progressive to infer, based on a belief in this equality, that even the most deprived bear moral responsibility for their acts equal to that borne by the privileged.⁹⁸ To return to the athletic analogy, it is simply wrong to argue that if all competitors are equal in other relevant respects, competitors who

96. See, e.g., Watson, *supra* note 48, at 276.

97. See Pillsbury, *supra* note 37, at 722 n.7.

98. See, e.g., Alasdair MacIntyre, *How Moral Agents Became Ghosts*, 53 SYNTHESE 295, 309 (1982); Waller, *supra* note 4, at 49; see also WILLIAMS, *supra* note 51, at 159 (discussing MacIntyre's views); Judith Andre, *Nagel, Williams, and Moral Luck*, 43 ANALYSIS 202 (1983) (discussing Williams' views). For a further discussion by Williams, see Bernard Williams, *Voluntary Acts and Responsible Agents*, 10 OXFORD J. LEGAL STUD. 1 (1990).

must high jump six feet are just as responsible for failing to clear that height as those who must clear only a three-foot barrier.

It is possible, of course, for an objector to argue that this whole line of reasoning, suitably developed, can be generalized to show that no one really bears moral responsibility. We often ascribe adult behaviors to early childhood environment within the middle class.⁹⁹ The logic in favor of exculpating some of the most deprived might arguably be universally extended, thereby undermining the whole point of moral responsibility.

It is hardly the intent of this Article to show that any conception of genuine moral responsibility is viable, beyond briefly suggesting below the unattractiveness of supposing otherwise. Apart from the broader issue of the viability of responsibility in a world apparently ruled by causal determinism and inherent randomness, useful and plausible distinctions can be drawn.

Admittedly, no one, regardless of economic class position, is in control of all elements that may crucially affect her ability to comply with legal norms.¹⁰⁰ It does not follow, however, that the idea of moral responsibility must completely unravel,¹⁰¹ or that if we absolve some of the most deprived from responsibility, we should equally absolve those whose crimes may have somehow stemmed from wealth and advantage.¹⁰² Until it can be shown that moral responsibility is incoherent or nonexistent, we can point to dramatic asymmetries between the unchosen environments of the most privileged and the most deprived.

For example, the unchosen environment of the privileged is, almost by definition, an environment rich in opportunities, alternatives, and resources. The legal environment of the privileged tends to be responsive, accommodating, and forgiving. Knowledge relevant to choice is at one's disposal. All of these considerations constitute nothing less than the material requisites of moral responsibility itself. By comparison, the unchosen environment of the most deprived is, almost by definition, less bountiful in the relevant sorts of opportunities, alternatives, and resources. Rather than accommodation, the most deprived are likely to encounter environmental indifference or threat. Thus, the unchosen environment of the rich is typically not relevantly constraining in the way characteristic of that of the poor. The asymmetry of absolving at least

99. See, e.g., KLEIN, *supra* note 44, at 172; WOLF, *supra* note 21, at 112-13.

100. See, e.g., Michael J. Zimmerman, *Luck and Moral Responsibility*, 97 ETHICS 374, 384 (1987).

101. See Pillsbury, *supra* note 37, at 732.

102. See Moore, *supra* note 40, at 1146.

some of the most deprived, while generally holding responsible those exposed to more favorable circumstances, is defensible.¹⁰³

IV. SEVERE DEPRIVATION AND CRIMINAL JUSTICE

While appellate judges only infrequently comment upon the relationship between severe deprivation and criminal responsibility, at least in any systematic, general way, there are certainly exceptions. For example, in a cocaine distribution conspiracy case that raised a "private entrapment" issue, Judge Richard Posner wrote:

All crime is a yielding to temptation, the temptation to obtain whatever gains, pecuniary or nonpecuniary, the crime offers. The temptation is a cause of the crime but not a cause that exonerates the tempted from criminal liability if he yields, just as poverty is not a defense to larceny. Cause and responsibility are not synonyms.¹⁰⁴

Although Judge Posner's conclusion is that causation and responsibility are distinct, his point might have been made as clearly by arguing that causation does not preclude responsibility, as the causal chain may run through a yielding to temptation, for which the defendant may well be responsible. With Posner's assumption that poverty does not legally excuse, there need be no quarrel. Poverty, on some definitions, is compatible with having, and knowing that one has, a reasonably wide range of viable prospective life-plans available, and hence a substantial measure of freedom, knowledge, and control. "Poverty," therefore, need not be synonymous with the sorts of horrific circumstances with which we have been concerned above.

Judge David Bazelon developed a substantially different approach from that of Judge Posner. Judge Bazelon wrote in a robbery and assault case:

It may well be that we simply lack the resources—to say nothing of the understanding—that would be required if those who stole to feed their addiction were removed from the criminal process on the ground that they are not responsible for their actions. But if this is so, we should recognize the fact, and not rationalize our treatment of narcotics addicts on the false premise that their crimes are the result of a wrongful exercise of free will. It is to

103. See, e.g., Peter van Inwagen, *Response to Slote*, 16 *SOC. THEORY & PRAC.* 385, 392 (1990); Vogel, *supra* note 25, at 137. Cf. Robert Audi, *Responsible Action and Virtuous Character*, 101 *ETHICS* 304, 309 (1991) ("[T]he crucial question of what one should do now and in the future can remain open even if one could not help getting to where one now morally is.").

104. *United States v. Manzella*, 791 F.2d 1263, 1269 (7th Cir. 1986).

me intolerable that persons already crippled by an almost hopeless cycle of poverty, ignorance, and drugs should be further burdened by the moral stigma of guilt, *not* because they are blameworthy, but merely because we cannot afford to treat them as if they are not.¹⁰⁵

Again, as suggested above, in some cases we may want to hold an addict responsible even for crimes that inevitably flow from her addiction. Such defendants may, in a sense, not be morally responsible for the crime itself, which is considered to be driven by the addiction. But moral responsibility for the crime may reasonably attach in cases in which the addiction itself is blameworthy. Conceivably, a person could freely and knowingly risk or seek addiction, appreciating that this choice could well lead to a future that renders the individual powerless in the face of the impulse to commit crime. Judge Bazelon's argument thus works best where we build in something like the approach taken above to the elements of responsibility.¹⁰⁶

In general, courts are reluctant to consider any sort of deprivation as undermining responsibility.¹⁰⁷ As a fair statement, it can be said that "an individual determined to be 'sane' within the traditional constructs of the criminal law is held accountable for his action, regardless of his particular disabilities, weaknesses, poverty, religious beliefs, social deprivation or educational background."¹⁰⁸ On the other hand, if a sane defendant in a capital murder case has suffered extraordinary abuse or deprivation, courts believe that they must consider such matters, perhaps whether such deprivation bears any causal relation to the crime or not.¹⁰⁹ This consideration occurs only at the sentencing phase of the trial, after guilt has already been determined.¹¹⁰

It is fair to ask why such matters as severe deprivation are relevant only when an already convicted murder defendant faces the death penalty.

105. *United States v. Carter*, 436 F.2d 200, 210 (D.C. Cir. 1970) (Bazelon, C.J., concurring); *see also* *United States v. Moore*, 486 F.2d 1139, 1255 (D.C. Cir.) (Wright, J., dissenting), *cert. denied*, 414 U.S. 980 (1973); *King v. United States*, 372 F.2d 383, 388 (D.C. Cir. 1966).

106. *See supra* part II.

107. *See supra* note 2 and accompanying text.

108. *Johnson v. State*, 439 A.2d 542, 551 (Md. 1982).

109. *See* *Boyde v. California*, 494 U.S. 370, 399 (1990) (Marshall, J., dissenting) ("[A]n offender's background and character unrelated to his crime should be considered by the sentencer.").

110. *See, e.g.,* *California v. Brown*, 479 U.S. 538, 544-45 (1987) (O'Connor, J., concurring); *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J., for the plurality); *Johnson*, 439 A.2d at 551.

Doubtless the death penalty is "qualitatively different."¹¹¹ However, courts' logic of admitting evidence on such matters seems to be that "defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse."¹¹² This logic would seem to transcend capital sentencing cases. There is no obviously satisfactory explanation for the courts' apparent inconsistency in this regard. It may be simply that we are more reluctant to tolerate judicial hypocrisy and illogic in condemning a defendant to death.

Let us consider, hypothetically, a murder defendant who does not face the death penalty, but instead may be subject to a life sentence, along with a punitive fine to be paid from any future prison earnings. If the defendant in such circumstances can show reduced culpability because his criminal acts are "attributable to a disadvantaged background," the case for admitting such evidence in a noncapital case would seem strong, despite the legal system's current linedrawing.

Nonetheless, there is, of course, a deeper problem in the logic of the courts' procedure in such matters.¹¹³ Common sense, and the commonly accepted logic of responsibility, suggest that even in the case of sane defendants not acting under duress or with any other currently recognized legal excuse, a defendant's moral culpability may be reduced or eliminated. This may be done to the extent that the crime can be ascribed to a constrictive or horrific background, the nature and effects of which the defendant could not reasonably be expected to alter or escape. In some cases, as we have seen above, one's background may carry the logical power to excuse, or to absolve of responsibility.

111. *Eddings*, 455 U.S. at 117 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

112. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *Brown*, 479 U.S. at 545).

113. Thus far, however, courts again have been willing to consider what could, in some cases, logically amount to a complete excuse, not at the guilt phase, but only at the sentencing phase. It is thus possible for a conscientious jury, during the sentencing phase of a capital case, to muse collectively along the following lines:

Based on what we heard at the guilt phase, we found the defendant guilty, but based on what we have only now, at the sentencing phase, heard of his life, we now think, in accordance with our common understanding of responsibility, that the defendant cannot reasonably be said to bear (sufficient) moral responsibility in this matter such as to be liable for criminal sanction, as opposed to some other, less stigmatizing disposition, such as confinement, treatment, or isolation.

For some support of the proposition that finding a criminal defendant not morally responsible for an act need not immunize that act, or license or facilitate other socially undesired acts by the defendant, see *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992). As it stands, the law provides no scope for this perhaps unimpeachable logic.

The broader problem is inadvertently illustrated by the Supreme Court's quotation in *Eddings v. Oklahoma*¹¹⁴ of the logic of the underlying state appellate court opinion. Eddings, charged with a capital murder allegedly committed at age sixteen, claimed that he suffered from "severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised."¹¹⁵ The Oklahoma court granted the existence of a personality disorder, but did not otherwise address the defendant's claim that his history, or the disorder itself, made the crime inevitable.¹¹⁶ Instead, the Oklahoma court concluded simply that the defendant "knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State."¹¹⁷

The Oklahoma court did not take the route of denying that the defense's claim of inevitability had been proven.¹¹⁸ Instead, the court placed itself in the position of endorsing the concept that even if the defendant's act was inevitably dictated by hostile external forces in all respects beyond his control, the defendant could still be convicted as long as he knew right from wrong at the time of the act.¹¹⁹

But a cognitive grasp of right and wrong does not exhaust what is logically required for responsibility. Suppose that instead of being inevitably driven by his earlier environment and personality disorder, the defendant had been forced to commit the murder under stark physical duress, such that he literally had no choice in the matter. Presumably the defendant would still have known the wrongness of killing at the time of his coerced act. Clearly the Oklahoma court would not convict such a defendant. But why does knowledge of the wrongness of one's act somehow establish responsibility for some nonculpably inevitable acts, but not others? Is some degree of freedom and control not generally relevant to responsibility, unless the absence of relevant freedom and control is itself culpable?¹²⁰ It is difficult to escape the conclusion that the courts system-

114. 455 U.S. 104 (1982).

115. *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980), *rev'd*, 455 U.S. 104 (1982).

116. *Id.*

117. *Id.*

118. For a discussion of the implausibility of the claim that any specific crime is inevitable, see *supra* note 93 and accompanying text.

119. See *Eddings*, 616 P.2d at 1170.

120. Again, while the Supreme Court in *Eddings* reversed the exclusion of the evidence of family history, personality disorder, and so forth, it did so only as a matter of possible mitigating evidence at the sentencing phase. See *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). As to the matter of criminal liability itself, the Court concluded that the defendant's proffered evidence "does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case." *Id.* Such a conclusion would be logically

atically mishandle and inconsistently apply the idea of criminal responsibility, according to the logic of the concept itself.

V. ALTERNATIVES TO THE STANDARD JUDICIAL APPROACH

The case has thus been made that contemporary judicial doctrines and practices regarding responsibility are, in certain crucial respects, inconsistent or logically unjustified. It is no doubt tempting to respond by suggesting that legal illogic should be tolerated, if bringing the law into accord with logic would be less attractive, from a practical standpoint, than the legal status quo.

Doubtless there are costs and disadvantages in recognizing the judiciary's proclivity for punishing those not logically subject to punishment. Costs must be incurred if we are to have more than merely random success in distinguishing those who do and do not bear moral responsibility for their actions, based upon the kind of severe deprivation discussed above.¹²¹ The judicial options range all the way from expensive individualized inquiry to deciding such matters based solely on the defendant's long term residential nine digit zip code. We can limit the degree to which each trial may probe the psyche and biography of the individual defendant. The minimum goal, after all, is not to decide correctly issues of moral responsibility in all cases, but to improve significantly upon the

tenable only if the Court were willing to find, as a matter of law, that the sorts of childhood experiences and psychological disorders referred to by the defendant could not, at least in his case, either render his crime inevitable or otherwise sufficiently impair the defendant's exercise of freedom and control such as to undermine his criminal responsibility. Whether this would be correct in Eddings' case is beyond the scope of this Article. Elsewhere, the Court has asserted that, at least as a matter of sentencing as opposed to liability, "adolescents as a class are less mature and responsible than adults." *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988). While this use of the term "responsibility" draws upon "responsibility" in the sense of behaving in an affirmatively appropriate way, it also seems to refer, more relevantly for purposes of this Article, to the issue of imposing blame or holding an individual morally accountable.

121. See, e.g., Morse, *supra* note 45, at 1253 ("[T]here is no scientifically dictated cutting point where legal and moral responsibility begins or ends."); Stephen J. Morse, *The Twilight of Welfare Criminology: A Final Word*, 49 S. CAL. L. REV. 1275, 1275 (1976) ("[I]t is doubtful that the adversary trial is the best forum for developing and disseminating the inordinately complex data and philosophical considerations that would be reasonably necessary to justify and promote a major change in societal attitudes towards criminal responsibility." (footnote omitted)). There may be cases in which a defendant might be found not to bear moral responsibility for an act, in light of severe deprivation, where that defendant would have committed similar acts even if she had at all times enjoyed privileged circumstances. An analogous problem is raised in the context of alleged "irresistible impulses." *Kenny*, *supra* note 50, at 47. It seems reasonable, though, to presume nonresponsibility in severe deprivation cases. After all, precisely analogous problems can be raised in cases of insanity, or any other standard excusing condition.

current pattern of universal judicial denial that extreme deprivation may ever preclude responsibility.

A deeper challenge to our approach, though, lies in the utilitarian grounds for reducing or abolishing judicial efforts to separate accurately the responsible and the nonresponsible. One plausible argument states that legally treating some persons as though they were morally responsible, even if they were not actually responsible, might lead not only those persons, but others, to begin actually to bear responsibility.¹²²

To compare the value of legal regimes with varying degrees of emphasis on moral responsibility, it is important first to acknowledge that there is no reason to assume that properly holding persons morally responsible necessarily involves any element of judicial malice, cruelty, or vindictiveness.¹²³ The potential gains from abolishing a nonvengeful judicial regime of moral responsibility in particular may thus be limited at the outset. Holding someone morally responsible may be a deserved compliment, rather than an expression of vengeance.

There should be a natural uneasiness with the deployment of any admitted legal fiction for the sake of utility. Several writers have questioned our ability to abandon judicially moral responsibility.¹²⁴ Michael S. Moore argues that "the law demands more than that we *pretend* people are free and thus hold them responsible *as if* they were. A just legal system requires people to be truly responsible."¹²⁵ On the other hand, some form of denial of moral responsibility seems increasingly common

122. See DENNETT, *supra* note 55, at 164; BRUCE N. WALLER, *FREEDOM WITHOUT RESPONSIBILITY* 158 (1990) ("[I]t may still be useful—as one causal element of [the actor's] individual's [sic] environment—to admonish him that 'stealing is wrong,' since such verbal contingencies may be an important causal-environmental influence in shaping him not to steal." (footnote omitted)); Horgan, *supra* note 92, at 356 (discussing the value of setting arbitrary requirements of responsibility); Bruce Waller, *Denying Moral Responsibility: The Difference It Makes*, 49 *ANALYSIS* 44, 46-47 (1989) (rejection of responsibility as opening the way to more effective use of behavioral technologies). For further discussion of some related issues, see Cheshire Calhoun, *Responsibility and Reproach*, 99 *ETHICS* 389 (1989); Clarke, *supra* note 19, at 68; Pillsbury, *supra* note 37, at 721 (discussing punishment as morally deserved, regardless of the genesis of the rational criminal act or the criminal's inability to have done otherwise, where the criminal attacks basic moral or human values).

123. Gary Watson cites Gandhi and Dr. King as exemplars of a non-vengeful desire to hold persons morally responsible. See Watson, *supra* note 48, at 286.

124. See, e.g., Moore, *supra* note 40, at 1122; Strawson, *supra* note 48 at 59; van Inwagen, *supra* note 103, at 394.

125. Moore, *supra* note 40, at 1122.

among contemporary philosophers,¹²⁶ and it is certainly possible to argue that at least a sharply diminished role for moral responsibility is viable.¹²⁷

There is much uncertainty as to the practical implications of the view that doubts or denies that anyone is morally responsible for their criminal acts.¹²⁸ If we discover that there really is no such thing as moral responsibility, free will, blameworthiness or praiseworthiness, the result would logically not be cause for deep embarrassment. That sort of deep embarrassment would be inappropriate, as there is certainly no reason for an organic machine to be embarrassed because it is only a machine, even if it once thought otherwise. On the other hand, there would equally be no indignity or deep embarrassment if we chose to pretend, contrary to fact, that moral responsibility existed.¹²⁹ If we are just organic machines, we need never feel genuine embarrassment by anything, including our lack of moral responsibility, or by our decision to pretend that all or some of

126. See Michael Slote, Book Review, *INT'L STUD. PHIL.*, Fall 1992, at 138, 138 ("Very recently, philosophers have been more willing to call into question the reality of free will and of moral responsibility than at any time previously in this century.").

127. The philosopher Galen Strawson reports narrower employment of the idea of moral responsibility than might have been anticipated by a reading of Peter F. Strawson's conclusions. Compare Strawson, *supra* note 48, at 59 with Galen Strawson, *Consciousness, Free Will, and the Unimportance of Determinism*, 32 *INQUIRY* 3 (1989). Galen Strawson reports a personal inclination to credit others morally for good acts, while not blaming them for any bad acts, and in a modestly self-deprecating inversion of these attitudes when assessing his own behavior, accepting no moral credit for his own good acts, while morally blaming himself for his own bad acts. See *id.* at 23. Strawson grants that his inclination to accept appropriate moral responsibility for his own bad acts may fade with time, while not addressing explicitly the likely stability of his remaining inclination to give moral credit to others. *Id.* He ventures that this congeries of attitudes "may not be particularly uncommon." *Id.* (footnote omitted). It is of course quite possible to condemn this pattern of attitudes, however well-motivated and self-critical, as logically groundless, elitist, unstable, and condescending. Cf. Moore, *supra* note 40, at 1147 (discussing the inclination to blame oneself morally on appropriate occasions, while refusing to morally blame others for their "caused" criminal acts).

128. See, e.g., RICHARD DOUBLE, *THE NON-REALITY OF FREE WILL* 225 (1991) (denying the reality of moral responsibility and of any familiar sort of objective morality as well, but still allowing for questions as to whether someone's act was "in character" or was rational from that person's perspective); KLEIN, *supra* note 44, at 4 (arguing that while moral blame is probably never appropriate, as our actions appear to result from causes beyond our control, we may be unable to abandon the institution of moral blaming, and should perhaps simply temper or reduce the moral blame we ascribe to those who have in some sense already suffered for their crime); GALEN STRAWSON, *FREEDOM AND BELIEF* 219 n.22 (1986) (denying that moral responsibility is only in a limited, technical sense compatible with the objectivity of morals); WALLER, *supra* note 122, at 152 (explaining that absence of moral responsibility does not or should not imply a denial of all morality and moral principles as well); Michael Slote, *Ethics Without Free Will*, 16 *SOC. THEORY & PRAC.* 369, 377 (1990); Bruce N. Waller, *Natural Autonomy and Alternative Possibilities*, *AM. PHIL. Q.*, Jan. 1993, at 73, 76.

129. See Wolf, *supra* note 56, at 392-93.

us can bear moral responsibility. It seems possible as well to admit our incapacity for moral responsibility and still strongly prefer a democratic rather than an elitist legal regime. We could do so on the grounds that the former assumedly has a greater likelihood of ruling in accordance with our mere tastes and interests as organic machines,¹³⁰ though not on grounds referring to any human dignity linked with moral responsibility.

It has been suggested that denying all moral responsibility need not mean that the legal system must abandon all reliance on objective morality itself.¹³¹ There is, however, reasonable concern among some scholars that without moral responsibility we are nothing more than complex, social, cognizing, sentient, organic robots.¹³² Professor Galen Strawson has argued that "no one in fact acts morally rightly" in the absence of free will and moral responsibility.¹³³ He further grants that "in a sense, there are certain situations where we appear to be morally correct in our actions, yet we are not truly acting freely. Ultimately, we are comparable to robots or other forms or amoral creatures who are also capable of acting morally correctly."¹³⁴

The denial of moral responsibility and moral agency may indeed leave us as organic robots, and undermine the objectivity of morals. This cannot be avoided by thinking of moral responsibility as merely a political

130. See Ramon Lemos, *Determinism and Political Freedom*, 60 *PERSONALIST* 101, 103 (1979).

131. See, e.g., WALLER, *supra* note 122, at 152; see also Bruce N. Waller, *A Response to Kane and Hocutt*, 20 *BEHAVIOR & PHIL.*, Spring/Summer 1992, at 83, 84. But see Michael S. Pritchard, Book Review, 45 *REV. METAPHYSICS* 638, 639 (1992) ("[I]t seems that we are being asked to accept the puzzling view that morality can be alive and well in a world without moral agents.") (reviewing BRUCE N. WALLER, *FREEDOM WITHOUT RESPONSIBILITY* (1990)); but see also Max Hocutt, *A Review of Bruce Waller's Freedom Without Responsibility*, *BEHAVIOR & PHIL.*, Spring/Summer 1992, at 71, 75-76; Robert Kane, *Free Will and Moral Responsibility: A Review of Bruce N. Waller's Freedom Without Responsibility*, *BEHAVIOR & PHIL.*, Spring/Summer 1992, at 77, 79-80. Hocutt and Kane are less sanguine than Waller about the likely attractiveness from our current perspective of a world without moral responsibility.

132. Cf. DENNETT, *supra* note 55, at 171; see also J.R. LUCAS, *RESPONSIBILITY* 29-30 (1993) (linking the absence of free will with existing as "mere automata"). For a discussion of moral subjectivism as undermining responsibility, see Judith Lichtenberg, *Subjectivism as Moral Weakness Projected*, 33 *PHIL. Q.* 378, 384 (1983).

133. STRAWSON, *supra* note 128, at 219 n.22.

134. *Id.* The contemporary polymath and former collaborator with the physicist Stephen Hawking, George F.R. Ellis, interestingly has reached a similar conclusion. See GEORGE F.R. ELLIS, *BEFORE THE BEGINNING* 120-21 (1993). Perhaps inspired by Niels Bohr's principle of the "complementary" or simultaneous truth of apparently incompatible descriptions, the philosopher of science Nancey Murphy has argued that "[f]or the ethicist it is true that human beings are free agents; for the social scientist it is true that human behavior is causally determined." Nancey Murphy, *Truth, Relativism, and Crossword Puzzles*, 24 *ZYGON* 299, 308 (1989).

construct. Nonetheless, there is certainly nothing to stop anyone who denies moral responsibility from also preferring, arbitrarily or otherwise, that the legal system operate merely to maximize overall utility. Such a person could apply the terms "just" and "unjust," "fair" and "unfair," or "right and wrong" while remaining consistent with this understanding. Further, there could be some prudential, self-interested reason for each of us to seek to maximize overall social utility, rather than to pursue self-ish courses more directly.

In any event, many scholars suspect that whatever moral world that could survive the demise of any familiar notion of moral responsibility would strike us now, with our current attitudes, as variously debilitating,¹³⁵ terrifying,¹³⁶ reducing the quality of our human relationships,¹³⁷ or simply a great loss of value.¹³⁸ While certain sorts of emotion and attachment could survive the demise of moral responsibility,¹³⁹ from our current perspective there would likely be a certain manipulateness or hollowness to such attachments.¹⁴⁰ Abandoning, rather than reforming, the judicial use of the familiar concept of moral responsibility seems unattractive.¹⁴¹

135. See Donald L.M. Baxter, *Free Choice*, 67 AUSTRALASIAN J. PHIL. 12, 17 (1989).

136. See Paul Benson, Book Review, 101 MIND 364, 367 (1992) (reviewing RICHARD DOUBLE, *THE NON-REALITY OF FREE WILL* (1991)).

137. See Wolf, *supra* note 56, at 390, 391 (referring to a world "so cold and dreary that any but the most cynical must shudder at it").

138. See Clarke, *supra* note 19, at 68; see also ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 291 (1981). By way of unreassuring contrast, it is sometimes suggested that abandoning the idea of moral responsibility would ultimately have dramatic, but unspecified consequences. See LUCAS, *supra* note 132, at 13 n.1 (1993) (citing Isaiah Berlin).

139. See Watson, *supra* note 48, at 260; Wolf, *supra* note 56, at 391.

140. See Watson, *supra* note 48, at 260; Wolf, *supra* note 56, at 391. For a parallel discussion of the likely long-term results of a general abandonment of distinctively objectivist views of morality, see R. GEORGE WRIGHT, *REASON AND OBLIGATION* 69-98 (1994).

141. It should be noted that one of the most thorough, detailed, and careful discussions of the matter has concluded that abandoning the strongest and most familiar forms of moral responsibility, as opposed to other more attenuated conceptions of responsibility, is both appropriate on the evidence and in many, but not all, respects not threatening to what persons have traditionally valued or sought in their moral lives. See HONDERICH, *supra* note 10. Honderich sees the demise of relatively rich senses of moral responsibility as a boon to the political left. *Id.* at 612. This conclusion seems, however, dangerously speculative and premature. Much work must be done in this area. One factor is that the outcome may depend upon the long-term viability of any sort of objectively binding morality after all dubious forms of moral responsibility have been discredited. It may well be difficult to reduce the disproportionate power of the powerful without giving objective moral reasons. Even if rich persons do not in any deep sense deserve their wealth, it would be desirable to be able to offer a genuinely objective, and not ultimately arbitrary or merely group-based, moral reason for egalitarian redistribution of that wealth. Could persons morally deserve redistribution in their favor? It is far from clear that the political left should welcome, for example, the demise of the idea of the objective inherent moral dignity or value of the

Even if it serves no other purpose, the movement to abandon or drain all metaphysics from the assignment of moral responsibility for an individual's acts should inspire us to revise current judicial practices to accord with our best understandings of moral responsibility, moral value, and the dignity of the choosing person. If we hold persons genuinely responsible for their acts, we thereby implicitly assert the dignity of the offender, and avoid a system of trial, sentencing, and incarceration that implicitly denies that dignity.¹⁴²

It has been argued, though, that "[b]roadening the class of persons who are considered not responsible for their behavior seems dangerous to public order and disrespectful to the personal dignity of individuals."¹⁴³ Fear for the public order from an expanded class of persons recognized as not bearing moral responsibility is, however, misplaced. There is no logical need to return such offenders to the community immediately, confine them judicially for trivial periods of time, or release them upon completion of some ineffective therapeutic regime. It is hardly vindictive or improperly punitive to regrettably confine actual offenders who pose unreasonable dangers to their neighbors for as long as they demonstrably pose such a danger. Moreover, there is a broad range of possible dispositions of such offenders that neither falsely imputes moral responsibility to the offender nor jeopardizes the safety of the community.¹⁴⁴

The claim that expanding the category of those not morally responsible for their otherwise criminal acts would undermine the dignity of those actors, while more interesting, is even more clearly wrong. Certainly, judicially compelled therapy or some sort of allegedly rehabilitative treatment for the offender¹⁴⁵ poses the risk of sheer manipulation of the

poor or oppressed. This general problem is taken up briefly in SMILEY, *supra* note 12, at 4-5, 21-26, 254-72. Professor Smiley argues for both meaningful, serious debate about ascriptions of responsibility, and for the demise of any objective moral value, truth, or grounds of persuasion, in favor of pragmatic competition among various shiftingly constituted conversational communities. *See id.* at 258. Professor Smiley recognizes the possibility of her views leading to disastrous outcomes, but does not consider such disaster to be inevitable. *See id.* at 271-72.

142. *See, e.g.,* Pillsbury, *supra* note 37, at 722.

143. Morse, *supra* note 45, at 1267.

144. *See* Foucha v. Louisiana, 112 S. Ct. 1780 (1992); Delgado, *supra* note 41, at 67. It should be noted that recognizing nonresponsible actors to be nonresponsible has no logical connection with a regime of preventive detention, in the sense of confining persons on the basis of alleged dangerousness, but in the absence of any alleged offense. *See* Morse, *supra* note 45, at 1256-57.

145. *See* Boldt, *supra* note 49, at 2313 (proposing that the legal system recharacterize drug addicts or alcoholics criminally charged as patients to be treated rather than punished); Morse, *supra* note 45, at 1256-57 (discussing the concept of "treating" the defendant rather than punishing him).

offender.¹⁴⁶ Further, the effectiveness of therapy or rehabilitation over the long term is also a controversial issue.¹⁴⁷

It is therefore crucial to recognize the difference between therapy or rehabilitation, and developing the conditions and capacity within society in order to foster moral responsibility. Our interest is solely in the latter. It is fair to say that rehabilitation aims roughly at changing the behavior of the offender from antisocial to prosocial, or from having the inclination to commit criminal acts to lacking such inclination.¹⁴⁸ In short, rehabilitation aims at making the offender morally good, or at least into someone inclined to perform good acts. This, however, is not at all what we mean by promoting the conditions under which we could reasonably hold the offender morally responsible.

Creating the conditions in which the legal system can reasonably hold persons morally responsible does not imply in the slightest that those persons will be morally good, or will obey the law. By itself, bearing moral responsibility does not imply that one will do the "responsible" thing, as bearing responsibility in a moral sense involves the capacity to choose to act wrongly as well as rightly.¹⁴⁹

What is the point, then, of the criminal justice system's participating in a broad societal effort to seek to enhance persons' capacities to possess moral responsibility for their actions? The first point to note has to do with practicality. It is entirely possible that we, as a society, have a better idea of how to promote the conditions for moral responsibility than we do of how to rehabilitate offenders, or make them good. That is, in a phrase, we may know more about the moral enfranchisement of persons than how to make them good. Doubtless this enfranchisement, or promotion of the conditions of responsibility, would involve a politically awkward egalitarian redistribution of opportunities.¹⁵⁰ As has been discussed, promoting a person's capacity to bear moral responsibility is

146. See generally THOMAS S. SZASZ, *LAW, LIBERTY AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES* 4-5 (1963) (opposing the use of coercive methods in mental health and the law); C.S. Lewis, *The Humanitarian Theory of Punishment*, in *THEORIES OF PUNISHMENT* 301 (Stanley E. Grupp ed., 1971) (opposing the humanitarian theory for the "dangerous illusion it creates").

147. See, e.g., Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, in *THEORIES OF PUNISHMENT*, *supra* note 146, at 317, 325-26.

148. See *id.* at 318-19.

149. See *supra* notes 50-61 and accompanying text.

150. As Judge David Bazelon observed in a slightly different context, developing the capacity of offenders for moral responsibility "might lead us to afford the job opportunities that pose for some the only meaningful alternatives to violence. It might demand for all children a constructive education, a decent place to live, and proper pre- and postnatal nutrition." BAZELON, *supra* note 88, at 100. Such job opportunities would have to be both geographically and "psychologically" accessible. See *supra* part III.

largely a matter of relevant sorts of freedom, control, and knowledge on the part of the actor.¹⁵¹ It is certainly possible that we know how to enhance these sorts of values better than we know how to lead an offender to act morally well.

Perhaps even more crucial than the issue of practicability is the enormous dignitary value of all those who have the capacity to act, for good or ill, in such a way as to bear moral responsibility. Despite the societal interest in self-protection that may require confinement of offenders and perhaps some program of rehabilitation, there is, as suggested at the outset,¹⁵² an extremely strong moral interest, rooted in considerations of dignitary value, in our transforming social circumstances in such a way as to bring many who are now only potentially responsible actors into a condition of actually bearing such responsibility. In this process, the law in general can play an important role. We do not enhance the dignity of those deprived of the capacity for morally responsible choice by simply pretending, through the judicial system, that they do bear such responsibility. It is essentially backwards to imagine that a judicial system promotes dignity by falsely ascribing moral responsibility to any group of persons. The first step in enhancing the dignity of criminal defendants is for the legal system to categorize such persons realistically, without engaging in the same self-serving metaphysical flattery of defendants that has obscured the effects of long periods of undeserved severe deprivation.

It may seem to violate the dignity of a person to place that person involuntarily into circumstances under which the person for the first time reasonably is subject to valid ascriptions of responsibility. Undoubtedly, some persons who cannot be held morally responsible for their acts may prefer to remain that way. By hypothesis, however, that is not a responsible or autonomous choice. There is something to be said for the dignitary value of transforming a person's circumstances in a way that would actualize the person's capacity for responsibility, even if coercion is involved. The coercion involved is the coercion of terminating an unnecessary wardship. It is coercion for the sake of creating autonomy. The potential for abuse of such coercion is limited radically by the purpose of its exercise: to promote the social conditions of responsibility, which at the level of personal capacities and powers involves freedom, knowledge, and control.¹⁵³ However much a few might want to resist this kind of social mat-

151. See *supra* part II.

152. See *supra* part I.

153. See JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES*, book 1, ch. VII, 16-18 (G.D.H. Cole trans., 1950).

uration,¹⁵⁴ it is hardly a serious restriction to provide the conditions of freedom and dignity to such persons for the first time.¹⁵⁵ In fact, it is not implausible to imagine that the presumably rare desire to remain nonresponsible may simply reflect the coercive, stultifying restrictiveness of one's environment.

VI. CONCLUSION

Rather than underwrite a legal and political process of egalitarian redistribution of freedom, control, and knowledge in favor of the most deprived, some may wish simply to abandon the fundamental principle of not legally punishing those whom our common understanding would deem not morally responsible for their acts.

Whether this is actually psychologically possible for us or for the judicial system is open to doubt.¹⁵⁶ Even if we can realistically imagine convictions for serious crimes carrying no moral stigma, or some sort of ultimately arbitrary politicized stigma only, dignity and moral value require that we not abandon moral responsibility as a general prerequisite to criminal liability. If the judicial system can, with any degree of accuracy and at reasonable cost, identify persons whose circumstances have prevented their acquiring moral responsibility for their otherwise criminal acts, the judicial system can contribute to the enhancement of the dignity of the lives of the most deprived.

Again, this is not a matter of rehabilitating such persons, in the sense of leading them to act morally well. Depending upon one's moral schema, one may already ascribe dignity, and perhaps infinite moral value, to every human being, whether they bear responsibility for their acts or not. However, this returns us to our initial problem in the interpretation of Immanuel Kant.¹⁵⁷ At some risk of paradox, it seems plausible to argue that even if we assume that all human beings are of infinite moral value,

154. See generally ERICH FROMM, *ESCAPE FROM FREEDOM* (1941).

155. The basic concern underlying fears of the abuse of a Rousseauian policy of "forcing people to be free" is that in practice, this may involve a totalitarian restriction of persons' alternatives and choices in the name of some higher, "positive" freedom consisting of believing and behaving properly, as determined by the state. See ROUSSEAU, *supra* note 153, at 18 (establishing "that whoever refuses to obey the general will shall be compelled to do so This means nothing less than that he will be forced to be free."). For discussion of this element of the philosophy of Rousseau, see STEPHEN ELLENBURG, *ROUSSEAU'S POLITICAL PHILOSOPHY* 247-49 (1976); RAMON LEMOS, *ROUSSEAU'S POLITICAL PHILOSOPHY* 115-17 (1977); ROGER D. MASTERS, *THE POLITICAL PHILOSOPHY OF ROUSSEAU* 329-31 (1968); John Plamenatz, *On le forcera d'etre libre*, in *HOBBS AND ROUSSEAU: A COLLECTION OF CRITICAL ESSAYS* (Maurice Cranston & Richard Peters eds., 1972).

156. See Strawson, *supra* note 48.

157. See *supra* note 23 and accompanying text.

whether they are currently capable of moral responsibility or not, there are reasons based in theories of human development, human fulfillment, or Kantian morality¹⁵⁸ to see substantial, if not infinite, moral value in leading persons from a condition of broad nonresponsibility to one of moral responsibility. This would involve the state's and the legal system's acting affirmatively to promote knowledge, freedom, and control on the part of those currently most deprived.

What is particularly interesting and unusual about such a conception is the possibility of combining egalitarianism and a concern for freedom with a crucial emphasis on expanding moral responsibility.¹⁵⁹ Legal re-

158. A number of recent interpreters of Kant have raised roughly similar ideas. For example, Barbara Herman presents the idea in negative form in her interpretation of Kant to the effect that "there is room to talk about institutional or cultural assaults on the conditions of agency." HERMAN, *supra* note 9, at 206. Sensibly, Professor Herman suggests that one's social and economic circumstances may crucially facilitate or impair one's very capacity for moral agency.

Professor Onora O'Neill argues to similar effect that "[f]inite rational beings . . . need positive support from others if they are to remain agents." O'NEILL, *supra* note 9, at 139; *see also id.* at 139 n.13. O'Neill's argument suggests that governments may fail to maximize moral value, moral freedom, autonomy or rational action, by failing to promote and enhance the social conditions of the exercise of moral agency by all persons. *Id.*; *see also* Engstrom, *supra* note 9, at 654.

Finally, Thomas E. Hill, Jr. has argued that "if rational capacities have an incomparable value, then surely one should try to develop them and improve them in oneself and others." HILL, *supra* note 9, at 50. Interestingly, Hill interprets Kant as not arguing for any general duty to promote the rational capacities of others, on the grounds that one cannot directly cause another person to choose more rationally and freely. *Id.* at 52-53. While this may be true, it hardly addresses the possibility of a government or legal system's providing the necessary means or the practical opportunity for the exercise of such enhanced rationality and freedom in choice. On Hill's interpretation, Kant does not address this latter, more relevant point. *Id.* at 53.

Actually, it may well be wrong to suppose that a government cannot possibly change a person's environment, forcibly or against her will, in such a way that given time and experience, she can properly be said to bear moral responsibility for a given class of acts for the first time. Consider a government for the first time disclosing and clearly explaining the consequences of each of a new range of plainly available options, while leaving the eventual choice to the individual. Hill concludes that "a legal system expresses its respect for the incomparable worth of each rational agent by seeking to secure for each . . . a full fair opportunity to live as a rational agent." *Id.* at 211. The government's basic moral duty may extend further to protect and enhance the rational agency of those who are already rational agents. But the government must first provide, if necessary and insofar as possible, the material and social prerequisites or necessary conditions for the exercise of agency and morally responsible choice first by those heretofore deprived of such prerequisites. While universal provision of such an opportunity, insofar as possible, is a strong moral duty, we may, if we wish hold open the possibility that in some extreme circumstances, this duty may yield to even stronger unspecified moral claims.

159. It might be noted in this connection that Samuel Scheffler has argued that "it is a striking fact that the dominant contemporary philosophical defenses of liberalism . . . do indeed advocate a reduced conception of responsibility." Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299,

formers should find attractive any conception that offers to coherently combine emphases on equality, freedom, and moral responsibility. The attractiveness of this conception is enhanced by its ability to bypass political controversies over the causes of the current circumstances of the most deprived. Leading the most deprived from a condition of generally lacking responsibility for their acts to a condition in which they do bear such responsibility largely can be accomplished without resolving a number of such disputed questions. We can make substantial progress, for example, in developing and enhancing a broader capacity for moral responsibility without raising the controversial question of the extent to which the current incapacity for bearing moral responsibility among the most deprived was intended by the politically powerful or by the broader society. This would result in a sharper focus on the enormous moral value of changing social circumstances to broaden the possession of the capacity for moral and legal responsibility.

This is not to suggest that contemporary advocates of equality have generally ignored issues of responsibility. In a way, the idea of responsibility is central to modern egalitarianism. One writer has, for example, recently argued that egalitarians generally believe that "society should indemnify people against poor outcomes that are the consequences of causes that are beyond their control, but not against consequences that are within their control, and therefore for which they are personally responsible."¹⁶⁰

With such an approach, we have no dispute, as long as the idea of control is interpreted with proper breadth. One of the aims of this Article, however, is to transcend such concern for identifying cases in which persons can or cannot be held responsible and then merely treating them differently on that basis judicially. Instead, this Article has emphasized the importance of the legal system's contributing to the process of increasing the percentage of persons to whom the legal system can, with complete reasonableness, impute moral responsibility. In the meantime, we should candidly recognize the hypocrisy and inconsistency involved in the judiciary's holding responsible those persons who do not meet the underlying criteria for responsibility.

314 (1992). This Article may be seen instead as illustrating the lines of reciprocal support between egalitarian redistribution and enhanced responsibility, thereby reducing what Scheffler sees as liberalism's political vulnerability on issues of responsibility. *Id.*

160. John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFF. 146, 147 (1993) (emphasis deleted).